Supreme Court, U. S.
FILED
MAY 2 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-744

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SAMUEL SHAPIRO AND BELLA SHAPIRO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 13, 1974

CERTIORARI GRANTED FEBRUARY 18, 1975

INDEX

	Page
Docket Entries (D.C. D.C.)	1
Docket Entries (C.A. D.C.)	5
Complaint for Injunction	8
Motion for a Temporary Restraining Order	17
Affidavit	20
Notices of Levy	
Exhibit A, Nanuet National Bank	22
Exhibit B, Chemical Bank	24
Exhibit C, Fred Tepper	26
Exhibit D, The Dime Savings Bank	27
Exhibit E, Empire National Bank	29
Transcript of Proceedings (December 13, 1973)	30
Order	71
Plaintiffs' Interrogatories	73
Request for Production, Inspection and Copying	75
Transcript of Proceedings (December 18, 1973)	77
Motion for a Preliminary Injunction	91
Motion to Dismiss	94
Transcript of Proceedings (December 19, 1973)	95
Response to Plaintiffs' Interrogatories Served on Wednesday, December 17, 1973 Pursuant to the Order of This Court of December 18, 1973 Ordering that Answers or Objections be Given to Those Interrogatories Which Through Reasonable and Good Faith Efforts, the Defendant, the Commissioner of Internal Revenue, Could Obtain	128
Supplemental Response to Plaintiffs' Interrogatories Served on Monday, December 17, 1973 Pursuant to the Order of This Court of December 18, 1973 Ordering that Answers or Objections be Given to Those Interrogatories Which Through Reasonable and Good Faith Efforts the Defendant, the Commissioner of Internal Revenue, Could Obtain	132
Transcript of Proceedings (December 21, 1973)	137
Petition	161
Order Allowing Certiorari	163

CIVIL DOCKET

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

C.A. No. 2172–73

SAMUEL SHAPIRO, ET AL.
v.
SECRETARY OF STATE

1973 Date	*Proceedings*
12/13/73	Complaint, appearance; Exhibits I thru V filed.
12/13/73	Summons, Copies (4) and Copies (4) of Complaint issued; all serv. 12–14.
12/13/73	Motion of Plaintiffs for Temporary Restraining Order; Affidavit; Memorandum of P & A's; Exhibits A thru E.
12/14/73	Temporary Restraining Order; security One Hundred Dollars ($100.00) cash; expires Dec. 19, 1973 at 5:00 P.M.; prel. inj. set Dec. 19, 1973 at 3:30 P.M.; issued 2:05 P.M. Serv. 12–14. Richey, J. (N).
12/14/73	Deposit by Counsel for Samuel Shapiro One Hundred Dollars ($100.00) cash security. (1–4–74 Injunction undertaking.)
12/13/73	Motion for Temporary Restraining Order, granted. Bond set at $1,000 Surety or $100.00 cash; preliminary injunction set 12–19–73, 3:00 p.m. (Rep. R. Weber) Richey, J. (N).
12/17/73	Interrogatories by pltfs. to deft. #2; c/m 12–17–73.
12/17/73	Request by pltfs. for production, inspection and copying of deft. #2; c/m 12–17–73.
12/18/73	Motion by plaintiffs to shorten time to answer interrogatories and to produce documents; P & A's; c/s 12/18/73.
12/18/73	Request of pltf. for production of documents, heard and denied; motion to expedite answers to interrogatories, heard and defts. to expedite answers if possible. (Rep: T. Dourian) Richey, J.
12/18/73	Transcript of Proceedings of Dec. 13, 1973, pages 1–68. Rep: R. Weber; Court copy.
12/19/73	Motion of pltfs. for a preliminary injunction; P & A's; exhibit 6, 7, A, 8, 9; c/s 12–19–73.
12/19/73	Corrections to defendant's memorandum of Points and Authorities.

1973 Date	Proceedings
12/19/73	Motion of defts. to dismiss; exhibits #1 thru 11; P&A; opposition to motion for preliminary injunction; c/m 12–19–73.
12/19/73	Motion of pltfs. for preliminary injunction heard, argued and taken under advisement; temporary restraining order extended for 24 hours from 5:00 p.m., 12–19–73. (Rep: T. Dorian) Richey, J.
12/20/73	Motion of pltfs. to compel answers of defts. to interrogatories; c/s 12–20–73.
12/20/73	Memorandum of pltfs. in opposition to defts. motion to dismiss; supplemental memorandum in support; c/s 12–20–73.
12/21/73	Response of deft. #2 to pltfs. interrogatories pursuant to Order of this court of Dec. 18, 1973; c/m 12–19–73.
12/21/73	Supplemental response of deft. #2 to pltfs. interrogatories pursuant to order of this court of Dec. 18, 1972; exhibit A; c/s 12–21–73.
12/21/73	Supplemental memorandum of pltfs.; c/m 12–22–73.
12/20/73	Order extending time for TRO dated 12–14–73 to and including 12–21–73 at 5:00 pm unless vacated. Issued 12–20–73 at 1:48 pm (n) Richey, J.
12/21/73	Motion of pltfs. for Preliminary Injunction heard and denied. (Rep: R. Weber) RICHEY, J.
12/21/73	motion of defts. to dismiss complain heard and Granted. (Rep. R. Weber) RICHEY, J.
12/21/73	Oral motion of pltfs. for stay heard & Granted and TRO of 12–14–73 extended to 6:00 P.M., 12–26–73, by consent of parties. (Rep. R. Weber) Richey, J.
12/21/73	Order denying motion of pltfs. for preliminary injunction; granting motion of Defts. to dismiss complaint; granting motion of pltffs. for stay of operation of this judgment and extending TRO to 6:00 P.M., 12–26–73 by consent of parties to enable pltfs. to seek a stay in USCA. (N) Richey, J.
12/26/73	Notice of appeal by plaintiffs from order entered on Dec. 21, 1973. Copies mailed to Robert H. Rankin, Asst. U.S. Atty. Deposit by Lewin $5.00.
12/27/73	Transcript of Proceedings of Dec. 21, 1973, pages 1–42. Rep: R. Weber; Court copy.
12/26/73	Preliminary record on appeal delivered to USCA; receipt acknowledged.
12/27/73	Certified copy of Order USCA continuing temporary restraining order until further Order of this Court.
1/11/74	Record on appeal delivered to U.S.C.A.; Receipt acknowledged.
1/22/74	Transcript of Proceedings, Dec. 18, 1973, pages 1–24. Court's copy. (Rep: Tom Dourian.)
1/22/74	Transcript of Proceedings, Dec. 19, 1973, pages 1–58. Court's copy. (Rep: Tom Dourian.)
1/28/74	Supplemental record on appeal delivered to U.S.C.A.; receipt acknowledged.

1973 Date	Proceedings
2/14/74	Certified copy order U.S.C.A. vacating order of 12/26/73 of U.S.C.A., sua sponte.
2/15/14	Certified copy Order U.S.C.A. denying appellants' application for stay.
2/19/74	Certified copy Order U.S.C.A. suspending effectiveness of denial of appellants' application for stay, sua sponte. (See order for details.)
2/19/74	Certified copy Order U.S.C.A. that appellants' brief shall be filed by the close of business 2/21/74, and appellees' brief shall be filed by close of business 2/27/74; denying appellants' motions to extend time for stay of extradiction and maintaining the status quo until oral argument. (See order for details.)
5/30/74	Motion of pltfs. for summary judgment; P & A's; Exhibit; Statement of material facts; c/m 5/29/74.
6/ 6/74	Motion by defts. to strike motion by pltfs. for summary judgment, or in the alternative, to stay all further proceedings with respect to the pltfs'. motion for summary judgment; Memorandum of Law; c/m 6/6/74.
7/ 3/74	Order staying all proceedings pending receipt of the mandate from U.S. Courts of Appeals. (N) Richey, J.
7/17/74	Certified copy Order U.S.C.A. denying petition for rehearing.
7/25/74	Transmittal sheet U.S.C.A. returning original record w/reporters transcripts (2 vols.) and one envelope exhibits; 2 vols. suppl. record and suppl. record containing remaining papers to U.S.D.C.
7/25/74	Certified copy Judgment U.S.C.A. affirming judgment U.S.D.C. as to dismissal of complaint as it relates to execution of extradition warrant, otherwise reversing and remanding for further proceedings; opinion attached.
8/ 6/74	Motion of deft No. 2 for extension of time to file a response to motion by pltfs. for summary judgment; Memorandum; c/m 8/5/74.
8/16/74	Opposition of pltfs. to motion by deft. #2 for extension of time to respond to motion for summary judgment; c/m 8/15/74.
8/22/74	Reply memorandum of deft. #2 to pltfs. opposition to motion for extension of time within which to file a response to motion for summary judgment; c/m 8/22/74.
8/22/74	Supplemental memorandum by pltfs. re: motion for extension of time to file response to motion for summary judgment; c/m 8/27/74.
9/17/74	Motion by pltfs. to supplement record; Attachment; c/m 9/17/74.
9/19/74	Order directing deft. to file response to motion for summary judgment by 10/10/74, no response necessary if Solicitor General notifies Court by 10/1/74 that he will file writ of certiorari. (N) Richey, J.

1973 Date	Proceedings
9/19/74	Motion to extend time, heard in part and agreed on. (Rep: T. Dourian) Richey, J.
10/10/74	Response by deft. #2, Commissioner of Internal Revenue, to motion for summary judgment filed by pltfs.; Affidavit of Henry P. Seufert filed as Exh. A w/attachments (2); Memorandum of Law; c/m 10/10/74.
10/10/74	Transcript of Proceedings, Sept. 19, 1974, pages 1-19. Court's copy. (Rep: Tom Dourian.)
10/23/74	Supplemental Memorandum by defts. in support of response to motion for summary judgment; Exhibits 1,2,3; Exhibits A thru E; c/m 10/23/74.
10/29/74	Order denying pltfs. motion for summary judgment; directing defts. to file certain brief with Court by 10-31-74; (signed 10-25-74) (N) Richey, J.
11/ 1/74	Order directing factual submission be served by 11-8-74; setting hearing for 11-12-74 at 9:30 am. (N) Richey, J.
11/ 8/74	Motion by deft. U.S.A. for an extension of time to file factual submissions; P&A's; c/s 11-8-74.
11/ 8/74	Opposition of pltfs. to motion of defts. to extend time for the filing of the factual submissions; exhibit; c/m 11-8-74.
11/ 8/74	Response by Commissioner of Internal Revenue pursuant to order of Oct. 29, 1974; Exhibits A & B; c/s 11/8/74.
11/ 8/74	Order denying motion by defts. for an extension of time. (N) Richey, J.
11/12/74	Hearing on remand begun & concluded. (Rep: T. Dourian) Richey, J.
11/18/74	Response by U.S.A. to Court inquiry; c/m 11/18/74.
11/22/74	Transcript of Proceedings of Nov. 12, 1974; pages 1 thru 83; Rep. Tom Dourian; Court Copy.
11/29/74	Objections by deft. #2 to form of order lodged with Court on Nov. 25, 1974; Memorandum of law; c/s 11/29/74.
12/16/74	Motion of deft. #2 for stay of proceedings; Memorandum of law; c/s 12/16/74.
12/17/74	Status Call. (Rep: T. Dourian) Richey, J.
12/19/74	Order directing discovery be completed by 1-31-75; directing deft. to respond within 10 days after receipt of pltfs. interrogatories; denying motion of defts. to stay. (N) Richey, J.
1/ 3/75	Certified copy Order U.S.C.A. directing Clerk, U.S.D.C. to return certified copy judgment U.S.C.A. forthwith. (Judgment & opinion returned to U.S.C.A. 1/3/75.)
1/ 3/75	Certified copy Order U.S.C.A. granting stay of proceedings.
1/17/75	Transcript of Proceedings; December 17, 1974; pp 1-31. (Rep. Tom Dourian) Court's copy.

GENERAL DOCKET

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-2260

Date	Filings—Proceedings
(G)12-26-73	Certified Original Preliminary Record (no transcript).
(G)12-26-73	4-Appellants' emergency application for stay (p-26).
(G)12-26-73	4-Appellees' opposition to emergency application for stay (p-26).
(B)12-26-73	Per Curiam order that the temporary restraining order by the District Court of December 14, 1973, and extended by order of the District Court December 21, 1973 is hereby continued until further order of this Court; Fahy, Sr. CJ and Leventhral, J.
(B)12-26-73	Certified copy of order sent to Clerk, US District Court.
(G)1-11-74	Certified Original Record (2 vols. of transcript) one envelope containing Exhibits (n).
(L)1-21-74	4-Appellees' motion to vacate order "Continuing" temporary restraining order, or in alternative, to summarily deny appellants' emergency application for stay of execution of extradition order (p-21).
(L)1-24-74	4-Appellants' response to motion to vacate order (p-24).
(L)1-28-74	Certified Original Supplemental Record (2 vols. of transcripts).
(L)2-5-74	4-Appellants' motion for clarification of court's communication and/or to extend the time of court's stay of extradition (Ok DMC).
(L)2-6-74	4-Appellant's motion for leave to file exhibit II for clarification with the court (p-6).
(I)2-12-74	4-Appellees' opposition to appellants' motion for clarification of Court's communication and/or extension of Court's stay of extradition (p-12).
(B)2-12-74	Per Curiam order sua sponte, that the order of this Court dated December 26, 1973, continuing the temporary restraining order of the District Court, be and the same hereby is vacated; Clerk is directed to transmit a certified copy of this order to the Clerk of the District Court as promptly as the business of his office permits; Fahy, Sr. CJ and McGowan, CJ.

Date	Filings—Proceedings
(G)2-13-74	4-Appellants' motion for order maintaining status quo until the oral argument on this case (p-13).
(G)2-13-74	4-Appellants' reply to apellees opposition to motion for clarification of court's communication and/or extension of court's stay of extradition (p-13).
(B)2-14-74	Per Curiam order denying appellants' emergency application for stay; Fahy, Sr. CJ and McGowan, CJ.
(B) 2-14-74	Certified copy of order sent to Clerk, US District Court.
(B) 2-14-74	Clerk's order that appellant's brief on the merits shall be filed by the close of business February 21, 1974, and appellees' brief shall be filed by the close of business February 27, 1974; Counsel may submit 10 copies of their briefs and 7 copies of the relevant portions of the record, in xerox form, in lieu of printing requirements of briefs and appendices set forth in the FRAP; further ordered by Court that appellants' motions to extend time of this Court's stay of extradition and order maintaining the status quo until oral argument are denied; Clerk is directed to schedule this case for argument on the merits on March 1st, 1974.
(B) 2-14-74	Clerk's order sua sponte that the effectiveness of this Court's denial of appellant's application for stay is suspended until the close of business February 19, 1974, in order to afford counsel for appellant an opportunity to file, prior to extradition an application for stay in the Supreme Court of the United States, if the application for stay is filed in the Supreme Court within the time allowed, this order will remain in effect pending ruling by the Supreme Court.
(B) 2-14-74	4-Appellees' opposition to motion for order maintaining status quo until oral argument (m-14).
(B) 2-14-74	4-Appellants' supplement to motion for order maintaining status quo until argument.
(L) 2-21-74	25-Appellant's Brief (p-21).
(L) 2-27-74	10-Appellee's Brief (p-27).
(M) 3-1-74	Argued before Fahy, Sr. CJ; Leventhal, and Robinson, CJ.
5-15-74	Opinion Per Curiam.
5-15-74	Judgment affirmed as to dismissal of the complaint insofar as it relates to execution of the extradition warrant, otherwise reversed and remanded for further proceedings consistent with this opinion. (n).
(B) 5-17-74	1-Verified Bill of costs.
(B) 5-28-74	4-Appellants' opposition to appellee's Bill of Costs and Bill of Costs on behalf of appellants (m-28).
(B) 5-29-74	25-Appellee's petition for rehearing (m-29).
(L) 6-17-74	Letter from Appellee advising of additional authorities pursuant to Local Rule 8(g).
(M) 7-1-74	Per Curiam order that each side shall bear its own costs; Fahy, Sr. CJ; Leventhal and Robinson, CJ.
(B) 7-17-74	Per Curiam order denying appellees' petition for rehearing; Fahy, Sr. CJ, Leventhal and Robinson, CJ.

Date	Filings—Proceedings
7-25-74	Copy of opinion and certified copy of judgment issued to the District Court.
7-25-74	Receipt dated July 25, 1974 from the Clerk, District Court for the original record with reporters transcripts (2 vols.) and one envelope of exhibits; one supplemental record with reporter's transcripts (2 vols.) and one supplemental record containing remaining papers.
(L) 7-26-74	4-Appellee's motion to stay mandate (m-24).
(M) 7-30-74	4-Appellants' opposition to motion to stay mandate (m-30).
(M) 8-12-74	Per Curiam order denying appellees' motion to stay mandate; Fahy, Sr. CJ; Leventhal and Robinson, CJ; Sr. CJ Fahy did not participate in the order.
(P) 12-18-74	Notification of filing petition for writ of certiorari in S.C. #74-744 on December 13, 1974.
(M) 1-3-75	Per Curiam order sua sponte, that the Clerk of the District Court is directed to return the certified copy of this Court's judgment forthwith; Fahy, Sr. CJ; Leventhal and Robinson, CJ.
(M) 1-3-75	Certified copy of the above order sent to Clerk, U.S. District Court.
(M) 1-3-75	Certified copy of Judgment and opinion returned from Clerk of the District Court.
(M) 1-3-75	Per Curiam order directing the Clerk to file appellees' motion for stay of proceeding in the District Court; appellees' motion for stay is granted; the Clerk is directed to transmit a certified copy of this order to the Clerk of the District Court as promptly as the business of his office permits; Fahy, Sr. CJ; Leventhal and Robinson, CJ.
(M) 1-3-75	Certified copy of the above order sent to Clerk, U.S. District Court.
(M) 1-3-75	4-Motion for stay of proceedings in the District Court (p-23).
(M) 1-3-75	4-Response to motion for stay of proceedings in the District Court (m-26).

[Filed December 13, 1973]

United States District Court for the District of Columbia

Civil Action No. 2172–73

SAMUEL SHAPIRO, 4 JOAN LANE, MONSEY, N.Y. 10952, (914) 356–6353; AND BELLA SHAPIRO, 4 JOAN LANE, MONSEY, N.Y. 10952 (914) 356–6353, PLAINTIFF

v.

SECERTARY OF STATE, DEPARTMENT OF STATE, WASHINGTON, D.C.; AND COMMISSIONER OF INTERNAL REVENUE, INTERNAL REVENUE SERVICE, WASHINGTON, D.C.; AND ACTING ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D.C. 20530, DEFENDANTS

COMPLAINT FOR INJUNCTION

I. JURISDICTION

1. This is an action to prevent the defendants, officers of the United States, from affecting the plaintiffs in a manner
2 and form which violates the Constitution and laws of the United States. The matter in controversy exceeds the value of $10,000, and the jurisdiction of this Court is invoked under 28 U.S.C. § 1331.

2. This is also an action to compel officials of the United States to perform duties owing to the plaintiffs by reason of formal promises made pursuant to diplomatic arrangements between the United States and the State of Israel. The jurisdiction of this Court is, therefore, invoked under 28 U.S.C. § 1361, the action being one in the nature of mandamus to compel officers of the United States to perform duties owed to plantiffs.

3. Plaintiffs are residents of New York and the defendants are residents of states other than New York. The matter in controversy exceeds the value of $10,000, exclusive of interests and

costs. The jurisdiction of this Court is invoked under 28 U.S.C. § 1332.

II. THE CLAIM

4. Plaintiff Samuel Shapiro is a native and citizen of the State of Israel. His wife is a native-born citizen of the United States, as is their daughter, who was born on November 15, 1973.

5. Plaintiff Samuel Shapiro was the subject of an extradition request by the State of Israel to the Department of State.
That request was presented to the United States District
3 Court for the Southern District of New York by agents of the defendant Attorney General and was litigated in the said court and in the United States Court of Appeals for the Second Circuit. Decisions on the case are reported at 352 F. Supp. 641, 355 F. Supp. 563, and 478 F. 2d 894. The Israeli charge related to allegations that plaintiff had obtained money from investors in Israel under false pretenses.

6. Throughout the course of these extradition proceedings—and throughout the course of the negotiations entered into among plaintiff's counsel, the Department of Justice, the Department of State, and the State of Israel, as set forth hereinafter—plaintiff has been required to post funds presently within the United States in banks as security for his appearance in the proceedings before the Immigration and Naturalization Service and the District Court. Bonds have been written in the total amount of $55,000, for which the plaintiff has given, as security to the bondsmen, funds totaling approximately $35,000 in bank accounts in the United States.

7. After the decision of the United States Court of Appeals for the Second Circuit rendered on April 6 1973, Counsel for plaintiff, Samuel Shapiro petitioned to the Supreme Court for a writ of certiorari. The petition was filed in the said Court, and was docketed as No. 72–1701.

8. From the inception of the extradition proceedings, plaintiff stated that he was prepared to return voluntarily to Israel to stand trial if agreement could be obtained that he would be released on bond and the trial held promptly. After the
4 filing of the petition for certiorari, discussions between counsel for plaintiff Samuel Shapiro and representatives of the Department of State were had to seek to effectuate an agreeable resolution of the request for extradition. It was

explained to attorneys of the Department of State that plaintiff was confident that he would be acquitted, but was concerned that his departure for Israel would affect the health of his wife, who was than expecting the couple's first baby and that the Israeli Government might refuse to release him on bail for an extended period until his trial was held.

9. With the agreement of plaintiffs' counsel, attorneys for the Office of the Legal Adviser of the Department of State communicated with the Embassy of Israel to see whether the case could be amicably resolved under these conditions. A Diplomatic Note dated August 16, 1973, was delivered to the Embassy of Israel asking whether it would approve of these conditions.

10. On September 4, 1973, the Embassy of Israel replied to the request by agreeing to three conditions in exchange for the withdrawal of the petition for writ of certiorari and the voluntary surrender of the plaintiff. The three conditions were that extradition would be delayed until after the birth of the plaintiff's child and the religious ceremonies incident thereto, that the plaintiff would be released on bail on his return to Israel, and that the trial in Israel would not be interrupted by extended delays.

11. Plaintff's counsel, Nathan Lewin, Esq., was informed on
September 21, 1973, in answer to a letter he sent directly
5 to the Attorney General of Israel, that the plaintiff would be released on bail of 250,000 Israeli pounds (approximately $60,000) when he returned to Israel.

12. On the basis of the representation made to him and the request by the Department of State that he take steps immediately to withdraw the petition for a writ of certiorari, as reflected in Exhibit I attached to this complaint, plaintiff's counsel drafted and submitted for signature by the Solicitor General a stipulation, signed by the Solicitor General for the United States and by plaintiff's counsel is attached hereto as Exhibit II.

13. By Diplomatic Note dated November 9, 1973, the Government of Israel restated its agreement to permit release on bail of 250,000 Israeli pounds, and the contents of that Diplomatic Note were communicated to plaintiff's counsel in a letter dated November 21, 1973. A copy of that letter is attached hereto as Exhibit III.

14. On November 16, 1973, pursuant to the agreement among counsel and with the Government of Israel, plaintiff's attorney notified the Department of State that a daughter had been born
to the plaintiffs.

6 15. Thereafter, pursuant to many discussions over several days, with representatives of the Department of State, the Department of Justice, and the Government of Israel, it was agreed that the plaintiff Samuel Shapiro would voluntarily surrender for extradition to Israel on December 9, 1973. Arrangements were made for the surrender date with the Government of Israel and with the Department of Justice, which assigned a Deputy United States Marshal to be at the United States Courthouse on that day to officially surrender the plaintiff Samuel Shapiro to an agent of the Government of Israel.

16. During the course of these discussions, set forth in paragraph fifteen hereof, plaintiff's counsel made clear that in order to post the bail required by the State of Israel as set forth in paragraph ten above, Mr. Shapiro would have to utilize the funds currently pledged as security for his appearances in the proceedings before the Immigration and Naturalization Service and the District Court as set forth in paragraph six heeof. At the suggestion of an official of the Embassy of Israel, arrangements were made with an Israeli Bank—Bank Leumi—to deposit these funds in the New York Branch of Bank Leumi as partial security for that Bank's guarantee in Israel of the bail
to be posed upon Mr. Shapiro's return to that country.

7 17. Pursuant to the agreements set forth in paragraphs fifteen and sixteen hereof, plaintiff Samuel Shapiro and acquaintances arranged that upon his surrender for extradition assets he had in the United States, including bank accounts which had been posted as security insuring his appearance in judicial proceedings and proceedings before the Immigration and Naturalization Service, would be deposited with the offices of Bank Leumi, an Israeli bank in the United States, so that a bank credit could be given in Israel to secure his release on arrival in that country.

18. On December 6, 1973, without any prior notice or warning whatever, agents of the Commissioner of the Internal Revenue served on banks in New York where the plaintiff maintains accounts and safety deposit boxes and, on information and belief, on all institutions where his assets may be located, Notices

of Levy pursuant to the jeopardy assessment provisions of § 6861 of the Internal Revenue Code. After several hours of seeking to discover on the telephone precisely what the nature of these liens was, plaintiff's counsel was informed at approximately 5:15 p.m. by Mr. Edward Hanley, a group manager with the Office of the District Director of Internal Revenue for Manhattan that the jeopardy assessments claimed liabilities of $6,843 for 1970 and a figure in excess of $83,000 in 1971.

19. Jeopardy assessments in the above amounts would exceed the assets plaintiffs Samuel Shapiro has in the United States and make it totally impossible for him to post security needed for bail in Israel which was the subject of the agreement described in paragraphs 9 and 10 of this complaint.

20. Jeopardy assessments in the above amounts would also leave the plaintiff Bella Shapiro and her daughter, who is three weeks of age, totally without funds on which to live in the absence of plaintiff Samuel Shapiro. Among the bank accounts levied were the accounts located at Chemical Bank, Route 59, West Nyack, New York 10960 and Nanuet National Bank, Route 59, Monsey, New York. These funds were the same funds posted as security for plaintiff's appearance in the proceedings before the Immigration and Naturalization Service and the District Court as set forth in paragraph six hereof.

21. The agents of the Commissioner of Internal Revenue involved in the actions set forth in paragraph eighteen hereof knew prior to the service of said notices on said Banks that plaintiff was the subject of extradition proceedings and was to be surrendered to the State of Israel on December 9, 1973. On information and belief, said agents also knew that the levied funds were, at the time of levy, being utilized by plaintiff as security for his appearances in the administrative and judicial proceedings in the United States as set forth in paragraph six hereof and were to be utilized as security for his bond in Israel as required by the agreements set forth in paragraphs eight through sixteen hereof.

22. On December 6, 1973 and Friday, December 7, 1973 plaintiff's counsel spoke to representatives of the Department of Justice and the Department of State and set forth his views, *inter alia*, that the intervening actions of the IRS violated the agreements concluded pursuant to which plaintiff agreed to surrender his right to further litigate the matter of extradition and constituted gross bad faith on the part of the Government

of the United States. Officials of both Departments advised plaintiff's counsel that they had no prior notice of the actions of the IRS and that they were "surprised" or "shocked" by these actions. On December 7, 1973 the State Department (per Thomas Tallerico, Esq.) informed plaintiff's counsel that as a result of the intervening actions of the IRS the Israelis were prepared to postpone the extradition of plaintiff until Sunday, December 16, 1973 in order to give plaintiff an opportunity to resolve this matter with the IRS.

23. Thereafter, plaintiff's counsel met on Monday, December 10, 1973 with agents of the Internal Revenue Service (Albert Feldberg, Special Agent; Richard A. Conde, Revenue Agent; and Victor F. Godfrey, Revenue Officer) to ascertain the basis for the IRS claim and discuss a possible resolution of the matter. Despite repeated requests, plaintiff's counsel was unable to ascertain from these agents the basis for the I.R.S. claim of taxes due from plaintiff. Plaintiff's counsel proposed to these agents that an agreement be entered into whereby the funds presently under levy (approximately $35,000) be deposited in the New York branch of Bank Leumi as partial security for that bank's guarantee in Israel of plaintiff's bond, with the United States to have a security interest in those funds second only to the State of Israel. Counsel was directed to embody this proposal in a letter. Pursuant to this instruction, plaintiff's counsel, on December 11, 1973, sent the letter attached hereto as Exhibit IV air mail, special delivery, to Mr. Victor F. Godfrey, District Director of Internal Revenue.

24. On December 12, 1973 counsel had delivered by hand a copy of this letter to Mr. Tallerico of the State Department along with a cover letter dated December 12, 1973 and attached hereto as Exhibit V. As set forth therein, plaintiff's counsel requested a further delay of the extradition until the I.R.S. responded to plaintiff's proposal and, if refused, until the judicial resolution of the issues set forth in this lawsuit.

25. As of the filing of this complaint and accompanying motion for a temporary restraining order, plaintiff's have been unable to secure the consent of the I.R.S. to plaintiff's proposal or the consent of the State Department to a postponement of extradition until a decision of this Court on the issues raised herein.

26. Without the funds presently subject to I.R.S. levy as set forth above, plaintiff will not be able to post the security re-

quired for release on bail in the State of Israel. Plaintiff cannot secure alternative funds to post security from any other source. Plaintiff would never have consented to waiver of his rights to litigate the matter of his extradition to the Supreme Court of the United States if he had known that the United States, through the I.R.S., would freeze the funds needed to post the bond required to secure plaintiff's release in Israel pursuant to the agreements set forth above.

27. The agents of the I.R.S. have known of the existing extradition proceedings, which were public knowledge from their inception. The alleged tax deficiencies relate to income in 1970 and 1971. Whatever inquiry the I.R.S. wished to make could have been instituted as much as one year ago. And since plaintiff's funds have been, during this entire period, subject to his appearance bonds before the Immigration and Naturalization Service since December 1972, there could not have been any danger of removal of these funds if an audit or inquiry had been instituted long before plaintiff was scheduled to depart.

28. If the Notices of Levy served on December 6, 1973 are permitted to remain in force simultaneously with plaintiff's extradition, plaintiff will be deprived of his statutory and constitutional rights to contest the legality of the assessments in violation of plaintiff's rights under 26 U.S.C. §§ 6213(a), 6851, 6861 and the Fifth Amendment of the Constitution. He will, for the period permitted for administrative and judicial resolution of the tax claim, be incarcerated in a prison in Israel and, therefore, unable to communicate with counsel representing him in the tax matter.

29. It is plaintiff's belief that the delay in instituting any inquiry whatever with respect to plaintiff's taxes was a deliberate means of preventing him from asserting defenses to the tax claim and denying him assistance of counsel in any proceeding relating thereto.

30. The actions of the State Department, the Department of Justice, and the IRS, together, in negotiating for plaintiff's waiver of his constitutional rights to further contest his extradition upon plaintiff's agreement voluntarily to return to Israel in the expectation that he would have the funds in issue available to post the bond required by the State of Israel, and then seizing those same funds without prior notice three days prior to plaintiff's removal from the jurisdiction of the

United States are violative of plaintiff's Fifth Amendment rights.

31. Unless this Court directs the lifting of the Notices of Levy on plaintiff's funds or, alternatively, enjoins the issuance of the extradition warrant until the matter of tax liability is clarified, plaintiff Samuel Shapiro will be forever deprived of his opportunity to contest the legality of the seizure of his funds and the basis for the Government's claim to plaintiff's money. He will also be deprived of liberty after his voluntary surrender notwithstanding the express and implied promise of the United States not to interfere with his release on bail. Plaintiff Samuel Shapiro will also be deprived of the Supreme Court consideration of his extradition which he voluntarily surrendered in return for the now-broken promises of the United States.

32. Unless this Court grants the relief requested herein, plaintiff Bella Shapiro, who is to be left in the United States with a baby one month old, will lack funds on which she and her child can live. It was and remains the intention of paintiff Samuel Shapiro to provide for his wife and child during his absence by arranging to have friends or family send her money on which to live. This will be impossible if he is incarcerated in an Israeli jail.

III. RELIEF

WHEREFORE, plaintiffs pray:

A. That this Court order the defendant Commissioner of Internal Revenue and his agents to take all actions necessary to lift the Notices of Levy presently in force on plaintiff's funds and located at the following places: Chemical Bank, Route 59, West Nyack, New York 10960; Nanuet National Bank, Route 59, Monsey, New York; the Dime Savings Bank, Fifth Avenue at 48th Street, New York, New York; Fred Topper, 85 Baxter Street, New York, New York; and any other places where such Notices of Levy have been served respecting plaintiff's funds; or alternatively.

B. That this Court issue a temporary and permanent injunction ordering the Department of Justice and its agent Thomas E. Ferrandina, United States Marshal for the Southern District of New York to refrain from executing pursuant to 18 U.S.C. § 3186 any warrant for extradition of Samuel Shapiro issued by the Secretary of State under said provision until the issu-

572-247 O - 75 - 2

ance by the IRS of its Notice of Deficiency as required by 26 U.S.C. § 6861 and until such time as plaintiffs shall have had opportunity to contest the legality of the jeopardy assessments made under 26 U.S.C. § 6851 as provided in the applicable provisions of the laws of the United States.

C. For such other and further relief as the Court may deem just and proper.

HERBERT J. MILLER, JR.
NATHAN LEWIN,
MARTIN D. MINSKER,
MILLER, CASSIDY, LARROCA & LEWIN,
1320 19th Street NW., Suite 500, Washington, D.C. 20036
(202) 293–6400,

Attorneys for Plaintiffs.

[Jurats omitted in printing]

[Filed December 13, 1973]

1 United States District Court for the District of Columbia

[Title omitted in printing]

MOTION FOR A TEMPORARY RESTRAINING ORDER

Plaintiffs, pursuant to Rule 65 of the Federal Rules of Civil Procedure and the complaint, pleadings, and Memorandum of Points and Authorities filed in support of this motion, hereby move the Court for a temporary restraining order and as
2 grounds therefor state as follows:

(1) Pursuant to arrangements concluded with the Department of State, the Department of Justice, and the State of Israel, plaintiff Samuel Shapiro agreed to waive further rights to litigate in the United States Supreme Court and the State Department his extradition to the State of Israel in return for the agreement of the State of Israel that upon the posting of a bond in the amount of 250,000 pounds plaintiff would be permitted to remain at liberty during the course of his trial there. All parties to this arrangement knew that plaintiff intended and needed to utilize funds presently posted as security in the United States for plaintiff's appearance in the extradition proceedings in the United States as partial security for the bond demanded by the State of Israel; the transfer of these funds to the New York branch of an Israeli Bank (Bank Leumi) as partial security for the Bank's guaranty of the contemplated bond was expressly suggested by the State of Israel during the course of said negotiations.

(2) Pursuant to these arrangements, plaintiff agreed voluntarily to surrender himself for removal to the State of Israel on Sunday, December 9, 1973.

(3) The agents of the Internal Revenue Service knew of the pendency of the extradition proceedings and of the intention of the State of Israel to seek plaintiff's removal. These
3 agents or some of them were in contact with agents of the Department of Justice conducting the extradition proceedings on behalf of the United States. These agents knew, or with an exercise of due diligence could have known, of all

the arrangements set forth hereinabove and in the complaint in this action.

(4) Nonetheless, without any lawful reason, these agents deliberately delayed the commencement of proceedings against plaintiff until three days before his scheduled removal from the jurisdiction of the United States, and then, sometime in the afternoon of December 6, 1973, without prior notice or warning of any kind to plaintiff or counsel, served Notices of Levy on banks and individuals holding the funds contemplated by plaintiff, the Department of State, the Department of Justice and the State of Israel to be utilized as bond pursuant to the arrangements concluded with these branches of the United States Government. The Notices of Levy were purportedly served pursuant to the jeopardy assessment procedures set forth at 26 U.S.C. §§ 6851, 6861.

(5) If the extradition of plaintiff presently set for December 16, 1973 as set forth in the complaint in this case is permitted to go forward while the Notices of Levy remain in force, plaintiff will be deprived of his right to contest the legality of the Government's seizure of his property, his right to liberty on bail during his trial in Israel as expressly and impliedly represented by the Government of the United States
4 and his right to litigate further the legality of his extradition, all in violation of his rights under 26 U.S.C. §§ 6213(a), 6861, and the process clause of the Fifth Amendment as more fully set forth in the pleadings filed herewith.

WHEREFORE, plaintiffs move this Court to enter an order:

(1) Directing the agents of the Internal Revenue Service to take all actions necessary to lift the Notices of Levy presently in force on plaintiff's funds and located at the following places: Chemical Bank, Route 59, West Nyack, New York 10960; Nanvet National Bank, Route 59, Monsey, New York; the Dime Savings Bank Fifth Avenue at 48th Street, New York, New York; Fred Topper, 85 Baxter Street, New York, New York; and any other places where such Notices of Levy have been served respecting plaintiffs' funds; or alternatively.

(2) Enjoining the Department of Justice and its agent Thomas E. Ferrandina, United States Marshal for the Southern District of New York to refrain from executing pursuant to 18 U.S.C. § 3186 any warrant for extradition of Samuel Shapiro issued by the Secretary of State under said provision until the issuance by the I.R.S. of its Notice of Deficiency as required by

26 U.S.C. § 6861 and until such time as plaintiffs shall have had opportunity to contest the legality of the jeopardy assessments made under 26 U.S.C. § 6861 as provided in the
5 States and his right to litigate further the legality of his extradition, all in violation of his rights under 26 U.S.C. §§ 6213(a), 6861, the Due Process Clause of the Fifth Amendment and the right to the assistance of counsel in defending against tax assessments, as more fully set forth in the pleadings filed herewith.

WHEREFORE, plaintiffs move this Court to enter an order:

(1) Directing the agents of the Internal Revenue Service to take all actions necessary to lift the Notices of Levy presently in force on plaintiff's funds and located at the following places: Chemical Bank, Route 59, West Nyack, New York 10960; Nanuet National Bank, Route 59, Monsey, New York; The Dime Savings Bank, Fifth Avenue at 48th Street, New York, New York; Fred Topper, 85 Baxter Street, New York, New York; and any other places where such Notices of Levy have been served respecting plaintiffs' funds; or alternatively.

(2) Enjoining the Department of Justice and its agent Thomas E. Ferrandina, United States Marshal for the Southern District of New York, from executing pursuant to 18 U.S.C. § 3186 any warrant for the extradition of Samuel Shapiro issued by the Secretary of State under said provision until such time as plaintiff Samuel Shapiro shall have had opportunity to contest the tax assessment made against him on December 6,
1973, as provided in the Internal Revenue Code and
6 other applicable provisions of the laws of the United States; and

(3) Granting such other and further relief as the Court may deem just and proper.

Respectfully submitted,

/s/ Herbert J. Miller, Jr.,
HERBERT J. MILLER, Jr.,
/s/ Nathan Lewin,
NATHAN LEWIN,
/s/ Martin D. Minsker,
MARTIN D. MINSKER,
MILLER, CASSIDY, LARROCA & LEWIN,
1320 19th Street NW., Suite 500,
Washington, D.C. 20036 (202) 293-6400,
Attorneys for Plaintiffs.

United States District Court
for the District of Columbia

[Title omitted in printing]

AFFIDAVIT

CITY OF WASHINGTON,
District of Columbia, ss:

SAMUEL SHAPIRO affirms and says:

1. I am one of the plaintiffs in this action and submit this affidavit in support of my motion for a temporary restraining order.

2. I have been advised by my counsel that the Internal Revenue Service claims that I owe more than $92,000 in taxes for the tax years 1970 and 1971. I filed a tax return for the 1971 tax year, which was accurate and which properly reflected my income and tax obligations. I had no income whatever for 1970.

3. It is my desire to contest the claim of the Internal Revenue Service that I owe taxes, and I wish to do so as promptly as possible.

4. I have also been advised by my counsel that the Internal Revenue Service questioned him on where I had the money to live and to pay for the services of counsel in the matter of my extradition. Before arriving in the United States I had made successful investments in Europe and had funds at that time, part of which I brought with me and the other portions of which were brought to me after I arrived in the United States. I can establish this fact by documentation and by the testimony of witnesses, and would be prepared to do so in a *bona fide* inquiry into my tax obligations.

5. If the assessments that have been made on the accounts for which Notices of Levy were filed on December 6, 1973 continue to be maintained after my extradition, I will not be able to defend against these tax obligations because, in all likelihood, I will be incarcerated and unable to raise bail on my arrival in Israel. There would be no realistic way for me to

communicate with my counsel and provide answers to any questions the Internal Revenue Service might have. Even if I were released on bail, the fact that I could not leave Israel would make it difficult for me to provide the information necessary for defense of the tax claim, but I would endeavor to do so as best I could.

SAMUEL SHAPIRO.

[Jurat omitted in printing]

(Ex. A to Memorandum of Points and Authorities in Support of Pltf. Motion for a TRO)

35

DEPARTMENT OF THE TREASURY—INTERNAL REVENUE SERVICE

DATE

NOTICE OF LEVY

Date: Dec 6, 1973

TO

Nanuet National Bank
Route 59
Nanuet, New York

INTERNAL REVENUE SERVICE

OFFICE OF ISSUE
Manhattan

You are hereby notified that there is now due, owing and unpaid to the United States of America from the taxpayer whose name appears below the sum of ——————————> $ 92,720.41

KIND OF TAX	TAX PERIOD ENDED	DATE OF ASSESSMENT	IDENTIFYING NO.	UNPAID BALANCE OF ASSESSMENT	STATUTORY ADDITIONS	TOTAL
1040	12-31-70	12-6-73	132-32-8801	$ 6,843.68	6.00 L/F	$ 6,849.68
1040	12-31-71	12-6-73	132-32-8801	85,876.73	-0-	85,876.73
				TOTAL AMOUNT DUE		$ 92,720.41

You are further notified that demand has been made for the amount set forth herein upon the taxpayer who has neglected or refused to pay, and that such amount is still due, owing, and unpaid from this taxpayer. Accordingly, you are further notified that all property, rights to property, moneys, credits, and bank deposits now in your possession and belonging to the taxpayer for with respect to which you are obligated and all sums of money or other obligations owing from you to this taxpayer, or on which there is a lien provided under Chapter 64, Internal Revenue Code of 1954, are hereby levied upon and seized for satisfaction of the aforesaid tax, together with all additions provided by law, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth herein, or for such lesser sum as is now or may be required by him, to be applied as a payment on his tax liability. Checks or money orders should be made payable to "Internal Revenue Service".

SIGNATURE: [signature] TITLE: Revenue Officer ADDRESS (CITY AND STATE): 120 Church St., New York, N.Y.

(Name and Address of Taxpayer)

Samuel SHAPIRO
200 Maple Avenue
and
4 Jona Lane
Nanuet, New York

CERTIFICATE OF SERVICE

I hereby certify that this notice was served by delivering a copy of this notice of levy to the person named below.

NAME: Barry Pallett
TITLE: Vice President
DATE AND TIME: Dec 6, 1973, 1 PM
BY (SIGNATURE AND OFFICE): [signature]

PART 3 — TO BE FURNISHED TAXPAYER

Form 668-A(DO) (10-71)

EXCERPTS FROM THE INTERNAL REVENUE CODE

SEC. 6331. LEVY AND DISTRAINT.

(b) SEIZURE AND SALE OF PROPERTY.—The term "levy" as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

(c) SUCCESSIVE SEIZURES.—Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary or his delegate may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) REQUIREMENT.—Except as otherwise provided in subsection (b), any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Special Rule for Life Insurance and Endowment Contracts.

(1) In general.—A levy on an organization with respect to a life insurance or endowment contract issued by such organization shall, without necessity for the surrender of the contract document, constitute a demand by the Secretary or his delegate for payment of the amount described in paragraph (2) and the exercise of the right of the person against whom the tax is assessed to the advance of such amount. Such organization shall pay over such amount 90 days after service of notice of levy. Such notice shall include a certification by the Secretary or his delegate that a copy of such notice has been mailed to the person against whom the tax is assessed at his last known address.

(2) Satisfaction of levy.—Such levy shall be deemed to be satisfied if such organization pays over to the Secretary or his delegate the amount which the person against whom the tax is assessed could have had advanced to him by such organization on the date prescribed in paragraph (1) for the satisfaction of such levy, increased by the amount of any advance (including contractual interest thereon) made to such person on or after the date such organization had actual notice or knowledge (within the meaning of section 6323(i)(1)) of the existence of the lien with respect to which such levy is made, other than an advance (including contractual interest thereon) made automatically to maintain such contract in force under an agreement entered into before such organization had such notice or knowledge.

(3) Enforcement proceedings.—The satisfaction of a levy under paragraph (2) shall be without prejudice to any civil action for the enforcement of any lien imposed by this title with respect to such contract.

(c) ENFORCEMENT OF LEVY.—

(1) EXTENT OF PERSONAL LIABILITY.—Any person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy. Any amount (other than costs) recovered under this paragraph shall be credited against the tax liability for the collection of which such levy was made.

(2) PENALTY FOR VIOLATION.—In addition to the personal liability imposed by paragraph (1), if any person required to surrender property or rights to property fails or refuses to surrender such property or rights to property without reasonable cause, such person shall be liable for a penalty equal to 50 percent of the amount recoverable under paragraph (1). No part of such penalty shall be credited against the tax liability for the collection of which such levy was made.

(d) EFFECT OF HONORING LEVY.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary or his delegate, surrenders such property or rights to property (or discharges such obligation) to the Secretary or his delegate (or who pays a liability under subsection (c)(1)) shall be discharged from any obligation or liability to the delinquent taxpayer with respect to such property or rights to property arising from such surrender or payment. In the case of a levy which is satisfied pursuant to subsection (b), such organization shall also be discharged from any obligation or liability to any beneficiary arising from such surrender or payment.

SEC. 6334. PROPERTY EXEMPT FROM LEVY.

(a) ENUMERATION.—There shall be exempt from levy—

(1) Wearing Apparel and School Books.—Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family;

(2) Fuel, Provisions, Furniture, and Personal Effects.—If the taxpayer is the head of a family, so much of the fuel, provisions, furniture, and personal effects in his household, and of the arms for personal use, livestock, and poultry of the taxpayer, as does not exceed $500 in value;

(3) Books and Tools of a Trade, Business, or Profession.—So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate $250 in value.

(4) Unemployment Benefits.—Any amount payable to an individual with respect to his unemployment (including any portion thereof payable with respect to dependents) under an unemployment compensation law of the United States, of any State or of the District of Columbia or of the Commonwealth of Puerto Rico.

(5) Undelivered Mail.—Mail, addressed to any person, which has not been delivered to the addressee.

(6) Certain Annuity and Pension Payments. Annuity or pension payments under the Railroad Retirement Act, benefits under the Railroad Unemployment Insurance Act, special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll (38 U.S.C. 562), and annuities based on retired or retainer pay under chapter 73 of title 10 of the United States Code.

(7) Workmen's Compensation.—Any amount payable to an individual as workmen's compensation (including any portion thereof payable with respect to dependents) under a workmen's compensation law of the United States, any State, the District of Columbia, or the Commonwealth of Puerto Rico.

(8) Salary, Wages, or Other Income.—If the taxpayer is required by judgment of a court of competent jurisdiction, entered prior to the date of levy, to contribute to the support of his minor children, so much of his salary, wages, or other income as is necessary to comply with such judgment.

SEC. 6343. AUTHORITY TO RELEASE LEVY AND RETURN PROPERTY.

(b) Return of Property.—If the Secretary or his delegate determines that property has been wrongfully levied upon, it shall be lawful for the Secretary or his delegate to return—

(1) the specific property levied upon,

(2) an amount of money equal to the amount of money levied upon, or

(3) an amount of money equal to the amount of money received by the United States from a sale of such property.

Property may be returned at any time. An amount equal to the amount of money levied upon or received from such sale may be returned at any time before the expiration of 9 months from the date of such levy. For purposes of paragraph (3), if property is declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount of money equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

APPLICABLE SECTIONS OF INTERNAL REVENUE CODE

6321. Lien for Taxes.
6322. Period of lien.
6325. Release of lien or discharge of property.
6331. Levy and distraint.
6332. Surrender of property subject to levy.
6333. Production of books.
6334. Property exempt from levy.
6343. Authority to release levy and return property.
7426. Civil actions by persons other than taxpayers.

FOR ADDITIONAL INFORMATION CONCERNING THIS NOTICE OF LEVY, PLEASE CONTACT THE PERSON WHOSE SIGNATURE APPEARS ABOVE THE NAME AND ADDRESS OF TAXPAYER.

BEST COPY AVAILABLE

37

(Ex 3 to Memorandum of Points and Authorities in Support of Plif. Motion for a TRO)

DEPARTMENT OF THE TREASURY – INTERNAL REVENUE SERVICE

NOTICE OF LEVY

December 6, 1973

TO

Chemical Bank
Route 59
West Nyack, New York

ORIGINATING DISTRICT
Manhattan

You are hereby notified that there is now due, owing and unpaid to the United States of America from the taxpayer whose name appears below the sum of ——————→ $ 92,726.41

KIND OF TAX	TAX PERIOD ENDED	DATE OF ASSESSMENT	IDENTIFYING NO.	UNPAID BALANCE OF ASSESSMENT	STATUTORY ADDITIONS	TOTAL
1969	12-31-69	12-6-73	132-32-3.01	$ 6,643.68	$ 6.73 L/F	$ 6,650.41
1969	12-31-71	12-6-73	132-32-3002	85,870.73	-0-	85,870.73
				TOTAL AMOUNT DUE		$ 92,726.41

You are further notified that demand has been made for the amount set forth herein upon the taxpayer who has neglected or refused to pay, and that such amount is still due, owing and unpaid from this taxpayer. Accordingly, you are further notified that all property, rights to property, moneys, credits, and bank deposits now in your possession and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer, or on account thereof, to the extent provided under Chapter 64, Internal Revenue Code of 1954, are hereby levied upon and seized for satisfaction of the claimed tax, together with all additions provided by law, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth herein, or for such lesser sum as you may be indebted to him, to be applied as a payment on his tax liability. Check or money order should be made payable to "Internal Revenue Service".

SIGNATURE: V.P. Collection Officer | TITLE: Revenue Officer | ADDRESS (CITY AND STATE): 120 Church St., New York, N.Y.

(Name and Address of Taxpayer)

Samuel STUPID
203 Maple Avenue
and
4 Joan Lane
Nanuet, New York

CERTIFICATE OF SERVICE

I hereby certify that this levy was served by delivering a copy of this notice of levy to the person named below.

NAME: H. R. Stewart
TITLE: Manager
DATE AND TIME: Dec. 10, 1973 2 PM
SIGNATURE OF REVENUE OFFICER: [signature]

PART 3 – TO BE FURNISHED TO TAXPAYER

Form 668-A (REV. 10-71)

EXCERPTS FROM THE INTERNAL REVENUE CODE

SEC. 6331. LEVY AND DISTRAINT.

(b) SEIZURE AND SALE OF PROPERTY. – The term "levy" as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

(c) SUCCESSIVE SEIZURES. – Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary or his delegate may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) REQUIREMENT. – Except as otherwise provided in subsection (b), any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Special Rule for Life Insurance and Endowment Contracts.

(1) In general. – A levy on an organization with respect to a life insurance or endowment contract issued by such organization shall, without necessity for the surrender of the contract document, constitute a demand by the Secretary or his delegate for payment of the amount described in paragraph (2) and the exercise of the right of the person against whom the tax is assessed to the advance of such amount. Such organization shall pay over such amount 90 days after service of notice of levy. Such notice shall include a certification by the Secretary or his delegate that a copy of such notice has been mailed to the person against whom the tax is assessed at his last known address.

(2) Satisfaction of levy. – Such levy shall be deemed to be satisfied if such organization pays over to the Secretary or his delegate the amount which the person against whom the tax is assessed could have had advanced to him by such organization on the date prescribed in paragraph (1) for the satisfaction of such levy, increased by the amount of any advance (including contractual interest thereon) made to such person on or after the date such organization had actual notice or knowledge (within the meaning of section 6323(i)(1)) of the existence of the lien with respect to which such levy is made, other than an advance (including contractual interest thereon) made automatically to maintain such contract in force under an agreement entered into before such organization had such notice or knowledge.

(3) Enforcement proceedings. – The satisfaction of a levy under paragraph (2) shall be without prejudice to any civil action for the enforcement of any lien imposed by this title with respect to such contract.

(c) ENFORCEMENT OF LEVY. –

(1) EXTENT OF PERSONAL LIABILITY. – Any person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy. Any amount (other than costs) recovered under this paragraph shall be credited against the tax liability for the collection of which such levy was made.

(2) PENALTY FOR VIOLATION. – In addition to the personal liability imposed by paragraph (1), if any person required to surrender property or rights to property fails or refuses to surrender such property or rights to property without reasonable cause, such person shall be liable for a penalty equal to 50 percent of the amount recoverable under paragraph (1). No part of such penalty shall be credited against the tax liability for the collection of which such levy was made.

(d) EFFECT OF HONORING LEVY. – Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary or his delegate, surrenders such property or rights to property (or discharges such obligation) to the Secretary or his delegate (or who pays a liability under subsection (b)(2)), shall be discharged from any obligation or liability to the delinquent taxpayer with respect to such property or rights to property arising from such surrender or payment. In the case of a levy which is satisfied pursuant to subsection (b), such organization shall also be discharged from any obligation or liability to any beneficiary arising from such surrender or payment.

SEC. 6334. PROPERTY EXEMPT FROM LEVY.

(a) ENUMERATION. – There shall be exempt from levy –

(1) Wearing Apparel and School Books. – Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family;

(2) Fuel, Provisions, Furniture, and Personal Effects. – If the taxpayer is the head of a family, so much of the fuel, provisions, furniture, and personal effects in his household, and of the arms for personal use, livestock, and poultry of the taxpayer, as does not exceed $500 in value;

(3) Books and Tools of a Trade, Business, or Profession. – So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate $250 in value;

(4) Unemployment Benefits. – Any amount payable to an individual with respect to his unemployment (including any portion thereof payable with respect to dependents) under an unemployment compensation law of the United States, of any State or of the District of Columbia or of the Commonwealth of Puerto Rico;

(5) Undelivered Mail. – Mail, addressed to any person, which has not been delivered to the addressee;

(6) Certain Annuity and Pension Payments. – Annuity or pension payments under the Railroad Retirement Act, benefits under the Railroad Unemployment Insurance Act, special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll (38 U.S.C. 562), and annuities based on retired or retainer pay under chapter 73 of title 10 of the United States Code;

(7) Workmen's Compensation. – Any amount payable to an individual as workmen's compensation (including any portion thereof payable with respect to dependents) under a workmen's compensation law of the United States, any State, the District of Columbia, or the Commonwealth of Puerto Rico;

(8) Salary, Wages, or Other Income. – If the taxpayer is required by judgment of a court of competent jurisdiction, entered prior to the date of levy, to contribute to the support of his minor children, so much of his salary, wages, or other income as is necessary to comply with such judgment.

SEC. 6343. AUTHORITY TO RELEASE LEVY AND RETURN PROPERTY.

(b) Return of Property. – If the Secretary or his delegate determines that property has been wrongfully levied upon, it shall be lawful for the Secretary or his delegate to return –

(1) the specific property levied upon,

(2) an amount of money equal to the amount of money levied upon, or

(3) an amount of money equal to the amount of money received by the United States from a sale of such property.

Property may be returned at any time. An amount equal to the amount of money levied upon or received from such sale may be returned at any time before the expiration of 9 months from the date of such levy. For purposes of paragraph (3), if property is declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount of money equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

APPLICABLE SECTIONS OF INTERNAL REVENUE CODE

6331 Lien for Taxes.
6322 Period of lien.
6325 Release of lien or discharge of property.
6331 Levy and distraint.
6332 Surrender of property subject to levy.
6333 Production of books.
6334 Property exempt from levy.
6343 Authority to release levy and return property.
7426 Civil actions by persons other than taxpayers.

FOR ADDITIONAL INFORMATION CONCERNING THIS NOTICE OF LEVY, PLEASE CONTACT THE PERSON WHOSE SIGNATURE APPEARS ABOVE THE NAME AND ADDRESS OF TAXPAYER.

39

(Ex C to Memorandum of Points and Authorities in Support of Ptlf. Motion for TRO)

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

NOTICE OF LEVY

December 6, 1973

TO
Ford Motor
85 Water Street
New York, New York

INTERNAL REVENUE SERVICE

DISTRICT DIRECTOR
Brooklyn

You are hereby notified that there is now due, owing and unpaid to the United States of America from the taxpayer whose name appears below the sum of ——— $ 92,726.41

KIND OF TAX	TAX PERIOD ENDED	DATE OF ASSESSMENT	IDENTIFYING NO.	UNPAID BALANCE OF ASSESSMENT	STATUTORY ADDITIONS	TOTAL
1040	12-31-70	12-6-73	132-32-8801	$ 6,843.68	$ 6.00 I/F	$ 6,849.68
1040	12-31-71	12-6-73	132-32-8801	85,876.73	-0-	85,876.73
				TOTAL AMOUNT DUE		$ 92,726.41

You are further notified that demand has been made for the amount set forth herein upon the taxpayer who has neglected or refused to pay, and that such amount is still due, owing, and unpaid from this taxpayer. Accordingly, you are further notified that all property, rights to property, moneys, credits, and bank deposits now in your possession and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer, or on which there is a lien provided under Chapter 64, Internal Revenue Code of 1954, are hereby levied upon and seized for satisfaction of the aforesaid tax, together with all additions provided by law, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth herein, or for such lesser sum as you may be indebted to him, to be applied as a payment on his tax liability. Checks or money orders should be made payable to "Internal Revenue Service".

SIGNATURE [signature] | TITLE Revenue Officer | ADDRESS (CITY AND STATE) 270 Church St., New York, NY

(Name and Address of Taxpayer)

Samuel SHAPIRO
205 Maple Avenue
Nanuy, New York

CERTIFICATE OF SERVICE

I hereby certify that this levy was served by delivering a copy of this notice of levy to the person named below.

NAME Ford Motor
TITLE Cash
DATE AND TIME 12/6/73 1:50 pm
SIGNATURE OF REVENUE OFFICER [signature]

PART 3 – TO BE FURNISHED TO TAXPAYER

FORM 668-A(REV. 10-72)

40

(Ex. D to Memorandum of Points and Authorities in Support of Ptlf. Motion for a TRO

December 6, 1973

TO
The Dime Savings Bank
Fifth Avenue & 48th. Street
New York, New York

INTERNAL REVENUE SERVICE

DISTRICT DIRECTOR
Brooklyn

You are hereby notified that there is now due, owing and unpaid to the United States of America from the taxpayer whose name appears below the sum of ——— $ 92,726.41

KIND OF TAX	TAX PERIOD ENDED	DATE OF ASSESSMENT	IDENTIFYING NO.	UNPAID BALANCE OF ASSESSMENT	STATUTORY ADDITIONS	TOTAL
1040	12-31-70	12-6-73	132-32-8801	$ 6,843.68	$ 6.00 I/F	$ 6,849.68
1040	12-31-71	12-6-73	132-32-8801	85,876.73	-0-	85,876.73
				TOTAL AMOUNT DUE		$ 92,726.41

You are further notified that demand has been made for the amount set forth herein upon the taxpayer who has neglected or refused to pay, and that such amount is still due, owing, and unpaid from this taxpayer. Accordingly, you are further notified that all property, rights to property, moneys, credits, and bank deposits now in your possession and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer, or on which there is a lien provided under Chapter 64, Internal Revenue Code of 1954, are hereby levied upon and seized for satisfaction of the aforesaid tax, together with all additions provided by law, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth herein, or for such lesser sum as you may be indebted to him, to be applied as a payment on his tax liability. Checks or money orders should be made payable to "Internal Revenue Service".

SIGNATURE [signature] | TITLE Revenue Officer | ADDRESS (CITY AND STATE) 270 Church St., New York, NY

(Name and Address of Taxpayer)

Samuel SHAPIRO
205 Maple Avenue
Nanuy, New York

CERTIFICATE OF SERVICE

I hereby certify that this levy was served by delivering a copy of this notice of levy to the person named below.

NAME [illegible]
TITLE [illegible]
DATE AND TIME [illegible]
SIGNATURE OF REVENUE OFFICER [signature]

PART 3 – TO BE FURNISHED TO TAXPAYER

FORM 668-A(REV. 10-72)

EXCERPTS FROM THE INTERNAL REVENUE CODE

SEC. 6331. LEVY AND DISTRAINT.

(a) SEIZURE AND SALE OF PROPERTY. – The term "levy" as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

(c) SUCCESSIVE SEIZURES. – Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary or his delegate may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) REQUIREMENT. – Except as otherwise provided in subsection (b), any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Special Rule for Life Insurance and Endowment Contracts.

(1) In general. – A levy on an organization with respect to a life insurance or endowment contract issued by such organization shall, without necessity for the surrender of the contract document, constitute a demand by the Secretary or his delegate for payment of the amount described in paragraph (2) and the exercise of the right of the person against whom the tax is assessed to the advance of such amount. Such organization shall pay over such amount 90 days after service of notice of levy. Such notice shall include a certification by the Secretary or his delegate that a copy of such notice has been mailed to the person against whom the tax is assessed at his last known address.

(2) Satisfaction of levy. – Such levy shall be deemed to be satisfied if such organization pays over to the Secretary or his delegate the amount which the person against whom the tax is assessed could have had advanced to him by such organization on the date prescribed in paragraph (1) for the satisfaction of such levy, increased by the amount of any advance (including contractual interest thereon) made to such person on or after the date such organization had actual notice or knowledge (within the meaning of section 6323(i)(1)) of the existence of the lien with respect to which such levy is made, other than an advance (including contractual interest thereon) made automatically to maintain such contract in force under an agreement entered into before such organization had such notice or knowledge.

(3) Enforcement proceedings. – The satisfaction of a levy under paragraph (2) shall be without prejudice to any civil action for the enforcement of any lien imposed by this title with respect to such contract.

(c) ENFORCEMENT OF LEVY. –

(1) EXTENT OF PERSONAL LIABILITY. – Any person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy. Any amount (other than costs) recovered under this paragraph shall be credited against the tax liability for the collection of which such levy was made.

(2) PENALTY FOR VIOLATION. – In addition to the personal liability imposed by paragraph (1), if any person required to surrender property or rights to property fails or refuses to surrender such property or rights to property without reasonable cause, such person shall be liable for a penalty equal to 50 percent of the amount recoverable under paragraph (1). No part of such penalty shall be credited against the tax liability for the collection of which such levy was made.

(d) EFFECT OF HONORING LEVY. – Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary or his delegate, surrenders such property or rights to property (or discharges such obligation) to the Secretary or his delegate (or who pays a liability under subsection (c)(1)) shall be discharged from any obligation or liability to the delinquent taxpayer with respect to such property or rights to property arising from such surrender or payment to the extent of a levy which is satisfied pursuant to subsection (b), such organization shall also be discharged from any obligation or liability to any beneficiary arising from such surrender or payment.

SEC. 6334. PROPERTY EXEMPT FROM LEVY.

(a) ENUMERATION. – There shall be exempt from levy –

(1) Wearing Apparel and School Books. – Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family.

(2) Fuel, Provisions, Furniture, and Personal Effects. – If the taxpayer is the head of a family, so much of the fuel, provisions, furniture, and personal effects in his household, and of the arms for personal use, livestock, and poultry of the taxpayer, as does not exceed $500 in value.

(3) Books and Tools of a Trade, Business, or Profession. – So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate $250 in value.

(4) Unemployment Benefits. – Any amount payable to an individual with respect to his unemployment (including any portion thereof payable with respect to dependents) under an unemployment compensation law of the United States, of any State or of the District of Columbia or of the Commonwealth of Puerto Rico.

(5) Undelivered Mail. – Mail, addressed to any person, which has not been delivered to the addressee.

(6) Certain Annuity and Pension Payments. Annuity or pension payments under the Railroad Retirement Act, benefits under the Railroad Unemployment Insurance Act, special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll (38 U.S.C. 562), and pensions based on retired or retainer pay under chapter 73 of title 10 of the United States Code.

(7) Workmen's Compensation. – Any amount payable to an individual as workmen's compensation (including any portion thereof payable with respect to dependents) under a workmen's compensation law of the United States, any State, the District of Columbia, or the Commonwealth of Puerto Rico.

(8) Salary, Wages, or Other Income. – If the taxpayer is required by judgment of a court of competent jurisdiction, entered prior to the date of levy, to contribute to the support of his minor children, so much of his salary, wages, or other income as is necessary to comply with such judgment.

SEC. 6343. AUTHORITY TO RELEASE LEVY AND RETURN PROPERTY.

(b) Return of Property. – If the Secretary or his delegate determines that property has been wrongfully levied upon, it shall be lawful for the Secretary or his delegate to return –

(1) the specific property levied upon,

(2) an amount of money equal to the amount of money levied upon, or

(3) an amount of money equal to the amount of money received by the United States from a sale of such property.

Property may be returned at any time. An amount equal to the amount of money levied upon or received from such sale may be returned at any time before the expiration of 9 months from the date of such levy. For purposes of paragraph (3), if property is declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount of money equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

APPLICABLE SECTIONS OF INTERNAL REVENUE CODE

6321. Lien for taxes.
6322. Period of lien.
6325. Release of lien or discharge of property.
6331. Levy and distraint.
6332. Surrender of property subject to levy.
6333. Production of books.
6334. Property exempt from levy.
6343. Authority to release levy and return property.
7426. Civil actions by persons other than taxpayers.

FOR ADDITIONAL INFORMATION CONCERNING THIS NOTICE OF LEVY, PLEASE CONTACT THE PERSON WHOSE SIGNATURE APPEARS ABOVE THE NAME AND ADDRESS OF TAXPAYER.

42

(Ex. E to Memorandum of Points and Authorities in Support of Pltf. Motion for a TRO)

Banco Nacional Bank
206 Ponce St
Bayamon, Puerto Rico

Pursuant to the authority in section 6331 of the Internal Revenue Code and by virtue of a levy issued in my behalf by the District Director of Internal Revenue of the above-named District, I hereby seized (including all of the property but subsequently released from levy) the following described property on the date shown:

Due From	In the Amount of	Internal Revenue District (City and State)
Samuel SUPIN 202 Ponce de Leon and 6 John Lane Bayamon, Puerto Rico	$ 22,775.43	Manhattan District New York, New York

Description of Property

Contents of Safe Deposit Box No. 467

Signature of Revenue Officer	Address	Date
V.F. Gonzalez	Internal Revenue Service 120 Church Street New York, New York	December 6, 1973

Form 2433 Part 1 (Rev. 4-72)

BEST COPY AVAILABLE

1 United States District Court for the District of Columbia

[Title omitted in printing]

TRANSCRIPT OF PROCEEDINGS

• • • • •

[Thursday, December 13, 1973; pages 1–68]

The above-entitled cause came on for hearing on temporary restraining order before THE HONORABLE CHARLES R. RICHEY, United States District Judge, commencing at 3:30 p.m.

APPEARANCES

On behalf of the plaintiffs: *Nathan Lewin, Esq.* and *Martin D. Minsker, Esq.*

On Behalf of the defendant State Department: *Murray Stein, Esq.*, Justice Department.

2 On behalf of the defendant Commissioner of Internal Revenue: *Stephen G. Fuerth, Esq.*, Tax Division, Justice Department.

On behalf of the Acting Attorney General: *Robert S. Rankin, Jr., Esq.*, Assistant United States Attorney.

• • • • •

3 PROCEEDINGS

The DEPUTY CLERK. Civil Action 2172–73, Shapiro versus the Secretary of State.

Mr. Lewin, Mr. Rankin, Mr. Stein, and Mr. Fuerth.

Mr. LEWIN. Ready for the plaintiffs, Your Honor.

Mr. RANKIN. Ready for the defendants, Your Honor.

The COURT. Let me inquire: Has the Government had the opportunity to sufficiently familiarize themselves with the pleadings to be able to argue the matter successfully or fully?

Mr. RANKIN. Your Honor, to my knowledge, the U.S. Attorney has not been served with a courtesy copy of the pleadings.

However, the Department of State and Department of Justice have been served.

They brought over a short while ago copies of the papers out, looked at them briefly, but have not thoroughly read them. These gentlemen are somewhat familiar with the case, having dealt with it before.

The COURT. Who is Mr. Stein? What agency does he represent?

Mr. RANKIN. He is from the Department of Justice, Your Honor.

The COURT. And Mr. Fuerth?

Mr. RANKIN. Mr. Fuerth is also with the Department of Justice in the Tax Division. Mr. Stein knows about the extradition portion of the case.

4 The COURT. Mr. Stein is assigned to what division in Justice?

Mr. STEIN. Criminal.

The COURT. All right.

I take it then that you are, with the help of your two colleagues, Mr. Stein and Mr. Fuerth, able to go forward with respect to at least the TRO today?

Mr. RANKIN. We think so, Your Honor.

The COURT. All right.

May I also inquire as to this—and I want both counsel, that is, counsel on both sides to correct the Court if the Court is in error:

I have had a brief opportunity to examine the pleadings in the privacy of my chambers. I did not get through the complete reading of the entire pleadings, but I read most of them and I think I have an understanding of what's happened here. And I want to see if my understanding of the facts is correct and maybe, therefore, we will save some time.

The one that seeks the relief, that is, the plaintiff, Mr. Shapiro, here, has been indicted in the State of Israel. And there were extradition proceedings held in the State of New York, I believe in the Southern District.

Mr. LEWIS. Yes, Your Honor.

The COURT. Well, if you will just sit . . .

Mr. LEWIN. Oh, I'm sorry.

572-247 O - 75 - 3

The COURT. I want you to be seated, sir. You will have plenty of opportunity to talk all you want.

[Both Mr. Lewin and Mr. Rankin sit down.]

The COURT. The State Department was brought into this picture after bond was posted in New York. And the plaintiff represented to the State Department and to the United States Government representative that he felt that he could secure an acquittal of the charges against him brought by the State of Israel.

He wanted to be sure, however, that if he were extradicted and sent back to Israel, that they would release him on bond pending the trial of his case.

Also, he did not want to be extradited after the order was entered until such time as his wife, an American citizen, had had her baby.

I understand from the pleadings in addition to what I've said, the baby was born on December 9th of this year; and that subsequent thereto and before the date set for his departure from the United States the plaintiff, Mr. Shapiro, had his accounts seized by I.R.S.

Now, that's as far as I have gotten. Are those facts substantially correct?

Mr. LEWIN. Yes, Your Honor, the facts are substantially correct.

The COURT. All right.

6 In what respect are they in error?

Mr. STEIN. Your Honor, if I may . . .

The COURT. Surely.

Mr. STEIN. I would like to clear something up.

The DEPUTY CLERK. Your name, sir?

Mr. STEIN. Mr. Stein.

I would like to make something clear that could have a false impression in Your Honor's mind, and that's the fact that the State Department did not enter the case until after the Courts of the United States had sustained the finding of extraditability against Mr. Shapiro.

The COURT. All right.

Mr. Lewin.

How do you pronounce your name so that I won't embarrass you, sir?

Mr. LEWIN. Lewin, Your Honor.

The COURT. Lewin?

All right. Then I was correct on that, too?

Mr. LEWIN. Right, absolutely right.

The COURT. All right.

In what respect was the Court's recital of the facts, so far that I know them, incorrect?

Mr. LEWIN. The only—the only point—the matter I can point to which is really an irrelevancy there, which is the date that Mr. Shapiro's child's birth, which was November

7 15th, not December 9th.

The COURT. It was not December 9th?

Mr. LEWIN. No, December 9th was the date that was agreed upon by Mr. Shapiro and the Department of Justice and the Department of State and the Government of Israel for his voluntary surrender.

The COURT. To the U.S. Marshal in New York?

Mr. LEWIN. To the U.S. Marshal in New York, and for his departure from the United States.

There is one other point which I think is relevant which I think Your Honor omitted in his recitation, which is that after the matter was litigated in the Courts in New York, a petition for Certiorari was filed with the Supreme Court of the United States.

The COURT. I forgot that. I'm glad you reminded me.

Mr. LEWIN. And that was really the basis, the consideration, as it were, for the agreement—part of the consideration for the agreement to go forward.

The COURT. I understand it has not been acted on yet.

Mr. LEWIN. Well, no, it was voluntarily dismissed by the petitioner pursuant to the arrangement that he had.

The COURT. Oh, I see.

Mr. LEWIN. In other words, what happened was, we were petitioning from the decision of the Second Circuit,

8 which took about—it was a long opinion by Judge Friendly—about 35 pages, and there were many legal issues there.

We petitioned from that decision, and it was at that stage that the discussions for voluntary surrender were begun and were concluded with an exchange of diplomatic notes.

However, the offer was given to the State of Israel by the Department of State, simply transmitted. The State of Israel made a formal response by a diplomatic note; and there was an exchange thereafter, another diplomatic note from the Govern-

ment of Israel; and everything was all arranged for the departure on December 9.

During all of this period of time, it was a matter of public notice to everybody that certainly was at all interested in Mr. Shapiro that he was under an order of extradition and that, therefore, he would be leaving the United States.

That was known—I think there really can't be any doubt about it that that was known by the Internal Revenue Service.

There was not a word during that period of time. And this also, I think, was a critical factor—not a word during that entire period of time from the Internal Revenue Service as to any question whatever regarding Mr. Shapiro's taxes for the years 1970 and 1971.

He was here for only a small part of 1970; and in 1971, he filed an income tax return. That was before he was married.

There was no question in any point about his taxes.

And he steadfastly maintained and does so in an affidavit filed with the papers that he owes no taxes and that his tax returns were accurate.

Notwithstanding this total absence of action over a course of what I think was a year by the Internal Revenue Service, they waited until literally one business day before he would leave the United States—and before they knew he would leave the United States—to take this very extraordinary remedy that the Internal Revenue Service gives them and that the Courts have sustained, in the language of Justice Brandeis, "only when there is an adequate opportunity afforded for a later judicial determination of legal rights."

That's the language of Justice Brandeis in the original landmark decision that has been cited over and over again.

The COURT. If that is in your papers, in what paper is that?

Mr. LEWIN. It's in our memorandum in support of the temporary restraining order.

The COURT. All right.

Let me see, Mr. Lewin, if I can find it.

[The Court looks through his papers.]

The COURT. What page?

Mr. LEWIN. It appears—it's quoted at pages 14 and 15. At the top of page 15, quote: . . .

The COURT. Hold on.

I can't go quite as fast as you can.

[The Court continues to look for the reference in question.]

The COURT. Is there anything in the agreement or arrangement whereby Mr. Shapiro after his extradition would take the money with him to post as a bond to secure his release in Israel pending trial there?

Mr. LEWIN. There was no specific reference to any funds being taken with him, Your Honor. But prior to entering and concluding the agreement, I wrote directly to the Attorney General of Israel to ask him what amount would be set for bail. I was advised that it would be 250,000 Israeli pounds.

I have checked with Mr. Shapiro . . .

The COURT. That represents how much in American . . .

Mr. LEWIN. That represents about . . .

The COURT. . . . money?

Mr. LEWIN. . . . close to $60,000.00 in American money.

The COURT. That's more than the $55,000.00 posted here.

Mr. LEWIN. That's more than the money that Mr. Shapiro has here. And the way it is here . . .

The COURT. Does he have money in Israel?

Mr. LEWIN. No, but he has a family. His father has an apartment that is going to be mortgaged with the bank in Israel.

The arrangements that were made and the reason that it was possible for him to be . . .

The COURT. Is it a condominium in Israel?

Mr. LEWIN. It is an apartment.

I think everybody buys apartments in Israel, as I understand it.

The COURT. It must be under a condominium or semi-type arrangement.

Mr. LEWIN. Some kind of arrangement of that kind.

And that is to be mortgaged in Israel to make up the balance that would make up the bank guaranty under which he would be released.

The COURT. Well, let me ask you this: Aside from the constitutional argument which you make which on its face may well have merit and which I hope this Court will always remain sensitive to, how will the Government of the United States protect itself if this man is extradited and these same monies that are now under the I.R.S. levy are released and used to post bond in Israel and for some reason the Israeli Government and the judicial machinery there order the forfeiture of the bond?

How will the I.R.S. in this country then be able to collect money, too?

Mr. LEWIN. If I might just . . .

The COURT. What security can you give to the United
12 States Government?

Mr. LEWIN. If I might just give two answers to that, Your Honor.

One is that the interest that the Internal Revenue Service presently has in these funds are subordinated to Mr. Shapiro's appearance in any event, because the very same funds have posted to as security for his appearance to surrender to the Marshal now this coming Sunday to be extradited.

If, in fact, Mr. Shapiro were in bad faith to flee or not appear for extradition, then that money would first be forfeited in any event because he would not be present.

So that to the extent that Your Honor is saying, "Well, what would happen if Mr. Shapiro, for some reason or other, would forfeit that bond in Israel?" the Internal Revenue Service is really under the very same threat, as it were, or the very same potential risk with the levy that is served right now.

The COURT. I don't understand that because the monies will be posted in Israel.

Mr. LEWIN. Well, that goes to my second answer, which is that I have proposed to the Internal Revenue Service—and they are here with the papers—what I feel is a compromise.

It's not, as it seems to me, an entirely satisfactory compromise from the plaintiff's point of view because it involves the money remaining in the United States; but it is a proceeding whereby the money would be transferred to the New
13 York branch of an Israeli bank, which would hold it, issue its guarantee in Israel, and the I.R.S. would take subordinate to that interest.

The COURT. In other words, you would give the Israelis prior lien, in effect?

Mr. LEWIN. I'd give them a prior lien, right.

But I think that is the only way that it can be worked out so that he can be released on bail in Israel, and if . . .

The COURT. You haven't heard from the I.R.S.?

Mr. LEWIN. No, I have not heard from the I.R.S.

But I have discussed that with them in person. I've had a letter read to them on the phone. It has something to do, I

suppose, with the mail deliveries; but they say that they have still not received the letter in hand.

The COURT. All right.

I think I understand your position, and I will give you full opportunity to make further argument.

Let me hear from the Government now. I want to ask them some questions.

Mr. Rankin?

Mr. RANKIN. Yes, Your Honor.

The COURT. Perhaps Mr. Fuerth can answer this question better than anybody else, although I say that without any adverse reflection on you.

Mr. RANKIN. Not at all, Your Honor.

The COURT. I am sure there is no more effective ad-
14 vocate anywhere than you are.

Why hasn't the I.R.S. responded to counsel's suggestion in a letter?

Mr. FUERTH. Well, Your Honor, I checked just before. We basically have not gotten the response yet, but I have checked with the appropriate authorities. And while they haven't formally acted on it, it is their information that the offer is not acceptable and if they were to ask—I must be quite frank Your Honor: If they were to ask my advice, I would tell them it was not acceptable because, in essence, what counsel proposes is that—I am taking the facts as he presents them—we now have a second lien. He proposes that we make a third lien.

In other words, we now have—we now will get the money . . .

The COURT. . . . subject to a first deed of trust or a first mortgage.

Mr. FUERTH. Subject only to Mr. Shapiro appearing this Sunday to turn himself in.

If he turns himself in, then that bond, of course, will not be forfeited and the money will be paid to us.

Now, counsel suggests that we should not only subordinate ourselves . . .

The COURT. Would you get the money anyhow?

Mr. FUERTH. No, if—some of the money, not all of it. You realize there is . . .

15 The COURT. How much will you get if he turns himself in on Sunday?

Mr. FUERTH. I understand from counsel $55,000.00 I understand that that's the amount of money that is on deposit.

Is that correct, counsel?

The COURT. I understand that that is on deposit.

Mr. FUERTH. Yes.

The COURT. But how much is owed?

Mr. FUERTH. Oh, I'm sorry, Your Honor, $90,000.00. The tax assessment was $90,000.00.

The COURT. How long has that assessment been outstanding?

Mr. FUERTH. That assessment was made on December the 6th.

The COURT. Of this year?

Mr. FUERTH. Of this year, yes.

The COURT. Well, why did you wait so long to do it?

Mr. FUERTH. We were conducting an investigation, and this was the time we felt was appropriate to make it. The law merely requires that we make an assessment within three years of the date that a return is filed unless we show fraud.

We are given three years pursuant to the provisions of Section 6501, Title 26, to make an assessment. And, of course, . . .

The COURT. Can you tell me the bases for a levy?

Mr. FUERTH. For a levy or for an assessment, sir?

16 The COURT. Well, for a levy and assessment here.

Mr. FUERTH. The basis for an assessment is that there was unreported income in the years 1970 and 1971, income that was not reported on his return.

The COURT. Do you have any evidence that you can present to the Court to verify that?

Mr. FUERTH. No, Your Honor, not today.

Your Honor, if I may suggest—and I am prepared to make an argument on that—I would suggest, Your Honor, that this Court lacks the necessary jurisdiction to question the merits of either the assessment or the making of the jeopardy assessment.

This specifically prohibited by statute, Section 7421 of the Internal Revenue Code, which prohibits the Court from enjoining into the assessment or the collection of the tax.

The COURT. That's in 7421?

Mr. FUERTH. Yes, of Title 26.

The COURT. I know that much.

[The Court looks for the reference in question.]

The COURT. Well, there are obviously certain exceptions.

Mr. FUERTH. Yes.

The COURT. . . . to the prohibition of suits to restrain the assessment or collection of taxes.

Mr. FUERTH. Yes, Your Honor.

The COURT. Now . . .

17 Mr. FUERTH. I can explain, Your Honor, if you wish.

The COURT. What are those exceptions?

Mr. FUERTH. There are two basic exceptions and there is one judicial exception.

The COURT. All right.

Mr. FUERTH. The first exception is that unless this is a tax covered by Section 6213—and that is the requirement for the extending of a statutory notice of deficiency.

Now, if Your Honor will bear me out, I will just backtrack slightly here.

The COURT. Well, why don't you go to 6212 first (a) and (c).

Mr. FUERTH. Well, 6212 and 6213 are tied together.

Let me explain the system of taxation in this sense: When the Commissioner has determined that there is a tax deficiency owed, he makes that determination; and in the normal case, he sends a statutory notice of deficiency, which is in common parlance is known as a ticket to the Tax Court, which upon receipt by a taxpayer, the taxpayer has a right to petition the Tax Court for a redetermination of his deficiency.

And Sections 6212 and 6213, in essence, say that an assessment may not be made unless the taxpayer has first received the statutory notice of deficiency and has had an opportunity to go to the Tax Court.

However, Section 6861, which is the provision for

18 making a jeopardy assessment, and 6212 and 6213 specifically exempt this requirement for first giving a statutory notice in the case of a jeopardy assessment, which we have here; and requires the statutory notice, rather than being delivered before the assessment is made, but be given 60 days after the making of the assessment.

So in this case we must send to Mr. Shapiro a statutory notice of deficiency on or about February 6th. Upon receipt of that statutory deficiency, he will have an opportunity to petition the Tax Court for a redetermination of his taxes.

If the Tax Court finds that he does not owe either any of the amounts or some portion, the tax will be reduced and any monies so collected will be refunded together with interest.

The COURT. All right.

You say he could also pay the taxes and come into this Court?

Mr. FUERTH. That's right.

He can pay the taxes and file a claim for refund, wait six months, and come into this Court . . .

The COURT. Come into this Court or the Court of Claims.

Mr. FUERTH. That's right.

The COURT. All right.

Now, what does 7426(a) apply to?

Mr. FUERTH. 7426(a) concerns claims by non-taxpay-
19 ers stating that their property was wrongfully levied.

In other words, Section 7426 gives a non-taxpayer relief to sue the Government directly in saying, "You have taken my property for the collection of someone else's taxes."

It specifically applies only to non-taxpayer, that section would not apply.

The COURT. All right.

Now, you are saying . . .

Mr. FUERTH. The only other . . .

The COURT. Go ahead.

Mr. FUERTH. The only other exception, Your Honor, is the exception set forth in the case of Enoch versus Williams Packing, which is 370 U.S. 1, which I am sure Your Honor is familiar with.

E-n-o-c-h-s.

The COURT. It is just Enoch; there is no "s" on it.

Mr. FUERTH. There isn't? Well, . . .

The COURT. Actually, if you've read the newspapers recently, I issued an opinion on that and your agency . . .

Mr. FUERTH. Yes, Your Honor, I am well aware of that.

The COURT. . . . within the last 48 hours, and that was one of the cases that we relied upon.

Mr. FUERTH. Yes, sir.

And, as Your Honor will recall, in that case the Supreme Court laid down two conditions for the granting of an
20 injunction; i.e., that, one, the taxpayer must show in its pleadings that under no circumstances could the Government ultimately prevail; and, two, there must be a basis for the granting of equitable relief, that there is not an adequate remedy at law.

In this case, Your Honor, I do not believe the pleadings by themselves show any basis at all for coming to that conclusion. They don't discuss the tax liability itself.

And, secondly, and I will say more importantly, the taxpayer clearly has an adequate remedy at law by either going to the Tax Court or filing a refund suit.

The COURT. All right.

Now, Mr. Stein . . .

Mr. FUERTH. Mr. Fuerth, Your Honor.

The COURT. Mr. Fuerth?

Mr. FUERTH. Certainly, Your Honor.

The COURT. The Government of the United States or any part or agency thereof or any official has always got to act in good faith, with the appearance of propriety at the very minimum, wouldn't you agree to that?

Mr. FUERTH. I do, Your Honor.

The COURT. Now, there isn't any question in this case but that there were negotiations between the Government of the United States and the counsel for plaintiff in the case at bar.

Mr. FUERTH. Yes.

21 The COURT. And that pursuant to that, there was an agreement made or entered into.

Mr. FUERTH. Well, I don't think I could agree with that, Your Honor.

The COURT. Well, let me just see something.

Mr. FUERTH. Yes, Your Honor.

The COURT. I have an affidavit before me that that is the case; and if it is not the case, Mr. Shapiro could be exposing himself for prosecution for perjury.

Mr. FUERTH. That is right, Your Honor.

The COURT. That's not true?

But I have to take it as true for the purpose of these proceedings, and I am going to do it on that basis unless you can show me the Court is in error in doing that.

It seems to me that the case law, as you impliedly agree, requires before a notice like this can be given or before a deficiency can be asserted, that Mr. Shapiro is entitled to have his day in court and have an opportunity to litigate the legality of the jeopardy assessment. And these jeopardy assessments were made in this case long after the agreements between Mr. Shapiro and the Government of Israel and the Government of the

United States were entered into. There isn't any question about that.

Mr. FUERTH. Well, Your Honor, the difficulty I have
22 here is that I recognize that Mr. Shapiro has entered into an agreement or has received some promises from the State of Israel.

The COURT. Received promises from the Government of the United States.

Mr. FUERTH. That, Your Honor, is where I think we differ. From all I understand of the facts, that's not true.

The COURT. All right.

Let's look at the pleadings.

[The Court and counsel look at the pleadings.]

The COURT. "The State Department through the office of the Legal Advisor communicated with the Embassy of Israel to see whether this case could be amicably resolved under certain conditions.

"A diplomatic note, dated August 16, 1973, was delivered to the Embassy of Israel, asking whether or not it would approve of these conditions."

Then on September 4 of this year, the Embassy replied to the request by agreeing to three conditions in exchange for the withdrawal of the petition for Cert and the voluntary surrender of the plaintiff.

The three conditions were that extradition would be delayed until after the birth of the plaintiff's child and the religious ceremonies incident thereto; that the plaintiff would be
23 released on bail on his return to Israel; and that the trial in Israel would not be interrupted by extended delays.

Now, all of this was agreed to.

Mr. FUERTH. Well, Your Honor, in fairness . . .

The COURT. Just a minute.

In paragraph 12, we have an allegation which says the following, and I quote: "On the basis of the representation made to him and the request by the Department of State that he take steps immediately to withdraw the position for writ of Certiorari, as reflected in Exhibit 1 attached to the complaint, plaintiff's counsel drafted and submitted for signature by the Solicitor General a stipulation signed by the Solicitor General of the United States and by plaintiff's counsel, which is also attached as Exhibit 2.

"And then by another diplomatic note, dated November 9, 1973, the Government of Israel restated its agreement to permit release on bail, 250,000 Israeli pounds, and the contents of that diplomatic note were communicated to plaintiff's counsel in the other dated note November 21, 1973, which is attached as Exhibit 3."

Then the baby was born on November 16th, and the proper people were informed.

There was never, according to paragraph 16 of the complaint, if you will look at it—do you have it before you?

Mr. FUERTH. Yes, I have.

24 The COURT. It's made to appear—and I remind you, Mr. Fuerth, that this is under oath—"That plaintiff's counsel made clear that in order to post the bail required by the State of Israel, Mr. Shapiro would have to utilize funds counter-pledged as security for his appearance in the proceedings before I.R.S. and the District Court; and at the suggestion of an official at the Embassy of Israel, arrangements were made with an Israeli bank to deposit these funds in a New York Branch of that bank, with the Department of Security for that bank to guarantee Israel there was a bail to be posted upon Mr. Shapiro's return to that country."

Now, then you see what it says in paragraph 17.

Mr. FUERTH. Yes, sir.

The COURT. That "Arrangements were further made with the United States Immigration and Naturalization Service that monies would be deposited in the Israeli bank of the United States so that a bank credit could be given in Israel to secure his release on arrival in that country."

Then you did what you did on December 6th without any prior notice of warning whatever and came in and seized all his assets.

It seems to me that the Government of the United States has breached its agreement with this plaintiff. That's the way I see it, according to the bare allegations of the complaint.

Isn't that what it says?

25 Mr. FUERTH. Well, Your Honor, first of all, I must . . .

The COURT. Mr. Fuerth, isn't that what the complaint says?

Mr. FUERTH. I see nothing in the allegations of the complaint that say that we would allow him to have this money available.

I see nothing in the allegations of the complaint that we would not make it jeopardy.

I see nothing in the allegations of the complaint that says he doesn't have to pay his income taxes.

The COURT. I didn't suggest that there was.

Mr. FUERTH. Yes, Your Honor, but the point is the I.R.S. was only aware of one thing: It was aware that the man was being extradited; it was aware that there were immigration proceedings against him, that he was an illegal immigrant in this country.

It was well aware and from these facts it could draw one possible conclusion: That once he left the United States and once these funds left the United States, any opportunity to collect them would be gone. We cannot go to Israeli courts to collect taxes.

The COURT. Let me ask you this: Were you aware that the State Department was negotiating with the Embassy of Israel?

Mr. FUERTH. We were not aware of it.

The COURT. Were you in touch with the U.S. Attor-
26 ney's Office conducting the extradition proceedings?

Mr. FUERTH. As I understand it—and I will say this, Your Honor: I have not talked to the actual people who were working on the case because they are out in the field today.

But from my brief calls to New York, I am told that all we knew from the U.S. Attorney's Office was the fact that extradition proceedings were in progress; we knew that he was scheduled to leave December 9th; but we did not know of any of the other information.

The COURT. May I ask you one last question . . .

Mr. FUERTH. Certainly.

The COURT. And then you can make whatever argument you want to.

Mr. FUERTH. All right.

The COURT. I want to be completely fair to the Government as well as to Mr. Shapiro.

What harm is going to come to Mr. Shapiro or the United States Government to give him an opportunity to have an expedited hearing on whether or not his assessment was proper before he is extradited?

Mr. FUERTH. What harm, Your Honor?

The COURT. Yes.

Mr. FUERTH. For the simple reason that you are going outside the normal and expressly set-up channels for litigating a tax liability by doing it in this Court.

27 In other words, he will properly get the statutory notice. He could pay the tax today and file an action in the Federal Court within six months.

That's proper relief.

The COURT. In the meantime, he is going to be extradited to Israel; he is not going to be able to produce the funds; and he is going to be put in jail; he is not going to be able to locate witnesses; and he is not going to be able, therefore, in all probability, to secure his acquittal.

It seems to me that the Government has got to find some way to treat even an alien illegally in this country in accordance with the standards of fundamental due process.

Bear in mind that this man is married to an American citizen; it may be that he might be ultimately entitled to an adjusted status, be that as an immigrant at the very least; and also an ordinary citizen of the United States is entitled to go through the procedures that are already outlined.

Now, as a practical matter, you and I know, Mr. Fuerth, that if he has to be extradited or is, in fact, extradited on Sunday of this week, namely December 16th. Mr. Shapiro is going to be found in Israel in one of their jails or concentration camps or whatever they have there.

And thus he is going to be penalized and not be in an effective position to litigate his feud with the client that you serve so effectively in this Court.

28 Mr. FUERTH. Again, I see no reason why he can't be represented by counsel.

The COURT Well, he is being represented by counsel but thousands of miles away in the State of Israel.

Mr. FUERTH. In the average Tax Court case, the defendant is not represented—counsel—in many cases, counsel deals with them strictly by letters.

The COURT. I understand. I understand.

But there may be far more to this than you and I are aware of, because you haven't been able to talk to the agent yourself and obviously the Court hasn't. I just have a bare fact complaint before me.

Mr. FUERTH. That's correct, Your Honor.

The COURT. I just don't like to see any agency of the Government, including the Court, I might add, act in a manner that is heavy-handed that doesn't comport with justice in its most liberal sense of the words.

And if a Court or a Governmental agency acts in any fashion, even though lawful, that has the net effect and result of denying somebody effectively an opportunity to fully participate in a matter of a dispute with the Government—that would be the case if a man were in jail in a foreign land, even though he is a native of that country; and we know that is going to be the case from the allegations here; we have to assume it for the purposes of this hearing—I don't think that that comports on its face with fundamental fairness.

29 It seems to me we ought to be able to find some way to (a) delay the extradition; (b) make a determination as to the propriety, the legality of the assessment; and then extradite him if that is the decision of the Government—and, apparently, it is. I won't quarrel with that. That is not before the Court.

But there ought to be some way in all of the law of the Constitution of the United States to give this man an opportunity to litigate this, even though I agree with you that some tax cases are litigated through counsel by way of mail.

It may be that they do in Israel what they used to do in this country: Not let prisoners write letters.

Do you know that?

Mr. FUERTH. No, I am not familiar with Israeli laws.

The COURT. Well, it wasn't until recently until some sensitive, hopefully one like the one you happen to be looking at right now, that prisoners were able to write letters to their counsel or even to confer with their counsel while they were incarcerated in institutions. When they had made application for parole and release, they were not even given a statement of the reasons. Now, we are making some progress and finally we are at least doing that. They are now allowed to have visitors and so forth.

How do I know what the conditions are in Israel and

30 you don't know either.

It just seems to me to have the appearance of being heavy-handed, and there ought to be some way within the Department of Justice, if I may emphasize the word "Justice," to see that this man is treated fairly here in accordance with

what obviously was an agreement concerning this tax problem.

Mr. FUERTH. Well, Your Honor—I'm sorry.

The COURT. I have said all I am going to say. I will listen to you.

Mr. FUERTH. Well, Your Honor, may I for the moment assume that your argument is directed to the second part of the Enoch case. Essentially, you are saying that under the circumstances, he would not have an adequate remedy.

The COURT. That's basically it, of course.

Mr. FUERTH. But the Supreme Court has laid down a two-part test: The Supreme Court has laid down a test to say, not only must a man come in to show that he doesn't have an adequate remedy; but he must also by well-pled facts show that under no circumstances could the Government prevail.

Now, I have read through the complaint and I have read a lot of allegations about the purported agreement between the State Department and the State of Israel. But I have read nothing in this complaint other than a bare and conclusionary allegation that this man doesn't owe the tax.

He hasn't said what his income was. He hasn't come

31 forth with any allegation whatsoever that he would by any reason of the law support an allegation that the Government could under no circumstances ultimately prevail.

Now, I must confess, Your Honor. . . .

The COURT. That's a good argument.

Mr. FUERTH. I've seen many . . .

The COURT. If I were in your shoes, I would try to make it, too; but I also would try to find some way, if I could in good conscience, consistent with the rights of my client, at least have enough delay to allow a litigated determination of this matter if it can't be compromised.

Mr. FUERTH. But the point is, the Supreme Court has said that the reason they don't want to grant injunctions—the reason they don't want the Court to interfere except in special extraordinary circumstances—is that the collection of the revenue is so important; and that they feel, the Supreme Court, that although the other remedies, in effect, force delay—in other words, they require a man to pay now and litigate later.

In fact, this may mean financial hardship; it may mean in some instances if the taxpayer has even shown that he doesn't have the money to pay the taxes—in other words, he has waived

572-247 O - 75 - 4

his right to go to Tax Court—he now comes and says: "I couldn't pay this assessment."

But, nevertheless, the Courts have uniformly not seen that as a basis for granting injunctive relief before the
32 revenue is collected.

In other words, the Supreme Court has seen—and the Congress believes—that to allow this injunctive intervention prior to the collection process could bring Government to a screeching halt.

The fact is that every taxpayer could come into this Court and for one reason or another ask this Court to rule on the collection of his tax before it's collected, I don't think any of our salaries are going to be paid.

The COURT. Sir, you couldn't be more right in a technical sense.

But how many cases in your career in the Government—and I assume that you have served as a career public servant for a number of years——

Mr. FUERTH. Yes, sir.

The COURT. . . . have you ever had a man in a situation similar to that of Mr. Shapiro here?

Mr. FUERTH. I have not, I must confess, Your Honor, . . .

The COURT. You have never seen a case like this?

Mr. FUERTH. Not with identical facts, Your Honor.

I have seen many cases, many cases, in which the facts are as harsh, if not equally harsh. And just as an example, Your Honor, I would refer Your Honor to a case called Enterprises Unlimited versus Davis in the Ninth Circuit.

The COURT. I will have my law clerk make a note of it.

33 Mr. FUERTH. As I say, it has no relation other than . . .

The LAW CLERK. Enterprise Unlimited?

The COURT. Enterprises Unlimited what?

Mr. FUERTH. Enterprises Unlimited, Inc. versus Davis.

The COURT. . . . versus Davis, Ninth Circuit.

What year?

Mr. FUERTH. Ninth Circuit, I believe it's '65 or '66.

The COURT. All right.

We will look at it.

Mr. FUERTH. Let me, Your Honor, show you the related facts in the case.

And in that particular case, a tax case, a woman who was not married to a man but who filed a joint tax return—the husband allegedly took the case to the Tax Court.

She alleged she had no knowledge of it. She alleged that she had been coerced into signing the return. She brought it.

And based upon the Tax Court action, which she claimed she had no notice, or which she claims she didn't employ a lawyer to represent her—the lawyer was not authorized to enter the stipulation, a very large assessment was determined against her.

Then the alleged husband died. The Government, on the basis of this assessment, came looking for her; seized her property.

34 She went into the District Court for the District of Nevada to attempt to get an injunction. And the Court, applying the standard of Enoch, said, "You haven't made out the basis for getting injunctive relief," notwithstanding the fact that at that particular point in time it did not appear that she had any remedy; because, at that point in time, you could not even go into the Tax Court to reopen a case.

The COURT. All right.

Mr. FUERTH. Ultimately, I will say, some four or five years later, through the diligence of counsel, she was able to reopen the Tax Court; and, ultimately, the Ninth Circuit did set aside the Tax Court decision and did give her the relief.

But I am merely pointing out . . .

The COURT. Wouldn't that be a terrible tragedy in this case if this man were sent to Israel under this order of extradition, languished in jail over there and convicted because he technically might not have met the requirements of the statute or the Enoch standards and he were erroneously convicted, would you want that kind of blood on your hands?

Mr. FUERTH. Well, I guess, Your Honor, where I fail to see—and I don't believe in our Court—it is necessarily denial of due process where a man can't make bail that he can't defend himself.

The COURT. Pardon?

Mr. FUERTH. If a man can't make bail in this country
35 and he is allowed to be in jail, that doesn't constitute a denial of his right to defend himself. I presume it happens in this Court all the time.

The COURT. You are not here very often then.

Mr. FUERTH. Well, I . . .

The COURT. We've got a new Bail Reform Act enacted by the Congress of the United States, which Mr. Rankin can tell you about even though he works on the civil side exclusively.

But practically everybody has to be admitted to bail no matter what the crime is.

Mr. FUERTH. That's true.

The COURT. It's very difficult to incarcerate somebody. Isn't that right, Mr. Rankin?

Mr. FUERTH. But, Your Honor, it is still not denial of due process if . . .

The COURT. Well, that's one of the reasons.

Mr. FUERTH. . . . the person meets the other conditions and this Court does not grant him bail—and this is a proper denial of bail—that is not a basis to not count crime or say he is denied his due process.

The COURT. Well, what I am trying to say to you, Mr. Fuerth, is that isn't there some way we could reach a middle ground here that's legitimate, lawful, and proper?

Mr. FUERTH. Well, Your Honor, short of either paying the tax or going to the Tax Court, I don't know of any.

36 The COURT. All right.

Mr. FUERTH. And Your Honor, I would be very happy to inquire as to when the statutory notice of deficiency will be forthcoming. In the shortness of time, I couldn't find out.

But short of that, Your Honor, I would submit that again that the Court just lacks enough jurisdiction to do that.

The COURT. Well, it may be. It may be.

The COURT. Is there anybody else on the Government's side that wants to argue because I've asked a lot of questions?

Mr. RANKIN. Yes, Your Honor.

The COURT. I think Mr. Rankin has got a frown on his face.

Mr. RANKIN. Well, Your Honor, I think—I did not get up and make a factual statement earlier.

The COURT. All right.

Mr. RANKIN. And we took up the fact issue.

I would like, if I could, to put this case in perspective as to the way I've seen it in the last hour and a half.

We talk about fundamental fairness, and what we have here is an individual who is illegally in this country.

It is my understanding that when in Israel, he was under a criminal complaint with a possible co-defendant. The plaintiff left Israel before the indictment came down. A co-defendant was tried and was sentenced to three years in jail. And it is my understanding that he was considered an accessory.

37 The plaintiff here was in this country illegally, and he is under deportation proceedings.

When the Government of Israel, pursuant to treaty obligations or pursuant to a treaty, asks the Department of State to institute the extradition proceedings—extradition proceedings were carried out in the Southern District of New York.

The plaintiff was there to defend himself. He was denied release. That was appealed. He was again denied release.

He filed a petition for writ of Cert in the Supreme Court. He sought a stay of the extradition but was unable from any Court to get a stay.

So, for all intents and purposes, at that time he was clearly extraditable.

Now, the Government—the Secretary of State—could have signed a warrant of extradition at that moment by law and the man would have been extradited.

No. Plaintiff then comes in with a request that he be allowed to remain in this country because his wife was to have a baby. The Department of State did not have to consider that.

They came in and said: "We would like for Israel to agree to three conditions." Now, the Department of State was really acting as in intermediary here.

They posed these proposed conditions as plaintiff had set forth in a letter to Israel. Israel did not agree to those conditions as posed by the plaintiff.

38 Rather, the Government of Israel, we would proffer to the Court, as to one of those conditions said: "The Government will not oppose his application for bail when he comes back to this country. It is obviously up to the Court to impose, and we simply agree that we will not oppose it," which, Your Honor, is substantially different from the Government saying, "Yes, we guarantee he will be released on bail."

So I would submit to this Court that subsequent to that time, after getting assurances from Israel as conduit through the Department of State as to what Israel was willing to do, the plaintiff then withdrew petition for writ of Cert in the Supreme Court.

Now, there is a stipulation in the record where the plaintiff's attorney stipulated with the Solicitor General that that petition be withdrawn. But no condition is contained in that stipulation, Your Honor, of any condition placed on the Department of State or the Government of Israel as to what happens when he gets back to Israel.

So we would submit that it is a fundamental fairness owed—I beg your pardon, Your Honor.

Again, the plaintiff came in after this assessment and asked to have his extradition held off. And the Department of State took it up with the Government of Israel, and they were very upset and reluctantly agreed to let him stay here one more week.

39 The Government of Israel said, "No more extensions" as far as they are concerned.

Now, what we are talking about here is an enjoining action under a treaty agreement with another country—basically what we are talking about here.

There is a signed warrant for this man's arrest and to be extradited to Israel. What the Department of State has done is through.

So we would submit that what this Court would do by entering some type of injunctive relief would be to interfere with a treaty agreement which says that the United States under certain terms and conditions, which have been fulfilled here, in its agreement with a foreign country will extradite this individual.

So that is what they want this Court to interfere with and hold up.

Now, we would, after further argument, Your Honor, without getting into the merits of the thing, if this Court would like jurisdiction to enter an injunction to enjoin the U.S. Marshal in New York from executing its warrant and taking him to the Israeli officials who will escort him back to Israel—if the Court would indulge me . . .

I am not thoroughly familiar with this case, Your Honor. It was given to me just before coming into Court: It's the case of Smith versus Katzenbach, and it's found at 351 Fed.

40 Second 810, 122 U.S. Ap D.C. 113. And it's a 1965 case written by Judge Leventhal—the opinion.

And in that case, it involves an Internal Revenue Service problem with an individual in North Carolina. And the plaintiff sought relief in this jurisdiction and asked this Court to restrain the Marshal or Government officials in North Carolina from taking certain actions or doing certain things which were related to this plaintiff.

And Judge Leventhal said: "This is not the appropriate jurisdiction," because the District Court there where the action is going on had the authority and should be the appropriate Court to take whatever action against these Government officials that might be deemed appropriate.

"And this Court does not have the equity jurisdiction to do that."

This is, essentially, what the plaintiffs are asking this Court to do, to exercise its equity jurisdiction to restrain the U.S. Marshals in the Southern District of New York.

And we submit that the Court lacks jurisdiction.

The COURT. What about Title 28, 1361?

Mr. RANKIN. Your Honor, we would submit that that is a remedy statute. It's the issuance of mandamus . . .

The COURT. That's in accordance to what the Court of Appeals has advised the trial Courts of this Circuit.

Mr. RANKIN. That will get you in the courthouse

41 door?

The COURT. Yes, sir.

Mr. RANKIN. Well, I've never heard . . .

The COURT. Do you want to read it?

Mr. RANKIN. Yes, I would like to.

The COURT. All right.

Mr. RANKIN. Not right now. I would like to go forward a little bit more.

The COURT. All right.

Mr. RANKIN. Even if they get in the courthouse door, they have a few other things to satisfy.

The COURT. Oh, I realize that.

Mr. RANKIN. And we would submit, Your Honor—I think I've covered the public policy situation that plaintiffs have to show to get temporary injunctive relief, that it's in the public interest to grant this relief; and we suggest to the Court that it's not irreparable injury. We would question the irreparable injury involved here.

As this Court knows, we have litigated with numerous criminals, thousands of miles away, through attorneys here or by

themselves. And it seems that these criminals have been entitled to their rights.

And we submit that plaintiff here has a very capable attorney, and he will be able to conduct whatever judicial proceedings might ensue, Your Honor, regarding the tax
42 situation.

I just can't see the irreparable injury involved when, in fact, what we have here is someone who is in this country illegally, who is pursuant now to treaty obligation and to an obligation of this country to extradite him pursuant to these procedures.

He is now seeking a delay when the Government, another arm of the Government on a completely different thing, a tax assessment, realizing that this man is going to leave and the assets will be gone, makes an assessment against him and, according to law, is entitled to do that.

We suggest that there is no irreparable injury here, Your Honor, sufficient for a temporary restraining order.

Basically, those are my observations at the present time. I don't know whether these gentlemen have any further things to say on behalf of the Government now.

Oh—I did cover the issue, I think, about the verified complaint where we take issue with some of the verified allegations in that complaint, Your Honor, concerning the content of this alleged agreement.

[The Court confers with the deputy clerk.]

The COURT. All right.

Mr. RANKIN. If the Court please, just briefly, I would like to state one more fact that I left out.

Your Honor, the warrant for the arrest is now in the hands of the Israeli Government in New York. It's not in the
43 hands of the U.S. Marshal.

The U.S. Marshal makes an arrest purely out of comity with Israel. Israel could walk out now and arrest this gentleman on the basis of the warrant that they have in hand.

The COURT. I see.

Mr. RANKIN. Very well.

The COURT. All right.

Mr. Lewin?

Mr. LEWIN. Yes, sir, Your Honor.

Just on this last proposition, it amazes me. I, in representing Mr. Shapiro in this extradition matter, read through the stat-

utes in 18 U.S.C.; and the notion that the Secretary of State's warrants can simply be executed by a foreign Government on American soil, I don't think finds any precedence in the cases or in the statute. It's got to be executed by United States officials pursuant to the language in that warrant, pursuant to ordinary procedures.

And it's really for that reason that we are in this Court, Your Honor.

I think that Mr. Rankin . . .

The COURT. Why aren't you in the Southern District?

Mr. LEWIN. We are not in the Southern District. There were negotiations that were conducted here with the Department of State.

There were discussions—I am located here—there
44 were discussions that were conducted here about the terms of Mr. Shapiro's release. We are not attacking his extradition.

I mean, I think that one thing that should be made clear is that Mr. Shapiro was perfectly prepared—his state of mind was such that he was returning to Israel on December 9th. And all of the arrangements were being made for his return to Israel on December 9th.

And I think that the critical factor is that during that entire period of time, a full year, I think, or a good number of months prior to his return, nobody whispered to him or to me in any way that there was any question about his taxes.

Now, I flew up to New York this Monday. I heard about these levies on Thursday. I called Mr. Stein. I called the Department of State.

We finally managed very late on Thursday—it may even have been on Friday—or else it was late on Thursday—to get a delay of a week in the extradition.

I flew up to New York, and I talked to the agent in New York. I insisted on meeting with him immediately to find out what the basis of this was.

And the fact of the matter was, it was one of the most uninformative meetings I have ever been. The three men sat across the table and they told me, "Well, this man has lived here for three years and he has gotten married and he has bought a house."

45 And he reported. He filed a tax return in '71. He filed a tax return in '72. Mainly, what he was doing in the

United States was trading in commodities. And he lost money during those years, and he has records to back that up.

They said, "Well, how could he have lived if he lost money?"

It was just pure rank speculation on their part.

They refused to give me the slightest iota of any basis for this kind of assessment.

I can only speculate, but certainly my speculation is that it is not beyond the realm of possibility that they just said, "Well, now, look: This man has lived here for a number of years, and, therefore, we're going to freeze whatever assets he's got here simply in case we ever turn anything up in a tax audit.

He was never asked about a tax audit.

They said to me on Monday: "Are you ready to produce his books and records?"

I said, "Well, I think, from the short discussion I had with him, we are perfectly prepared to produce everything. All we need is the time to get it together and to talk about it, and then, if there are any questions about it, he can explain it."

Now, that's the ordinary, Your Honor, and that would have been the procedure that would have been followed if I.R.S. had very politely either called me or called Mr. Shapiro
46 in July, in August, in September, in October, in November, anytime, and said, "Look, we're checking this man's taxes. Could you please bring down his books and records."

It's really absurd for the gentelman from the United States to be saying that even though no irreparable injury or that Mr. Shapiro has adequate representation, he can go into a Tax Court.

He can't go into a Tax Court.

I told him to get together his books and records. In 1971, he was not yet married—he was a bachelor—I am thinking back to my own bachelor days—he has records that were kept irregularly.

He has gone back to his bank and asked them to make up the bank statements for him. They told him it takes two to four weeks to get all back statements and get the microfilm to check.

There are matters that can be discussed with the Internal Revenue Service. The records can be opened to them. And whatever tax questions that there are can be established.

The man had investments in Europe—I think that is reflected in an affidavit before Your Honor—which were successful before he came to the United States and he has lived off those investments.

And I might say he lost money in the United States. He probably would have done better to have stayed in
47 Switzerland and invested his money there rather than coming to the United States and attempting to trade in commodities.

But, in any event, to say to this man—for the United States to say to this man with one hand, "We are seizing $92,000.00 on the sheerest of speculation without giving you a single word or whisper of what basis that's being made on"; and with the other hand saying, "We are shoving you out the door and into a jail in Israel"—it seems to me then to be just outrageous.

It's just the rankest denial of due process with regard—forget about his extradition for a minute—with regard to the seizure of that $92,000.00

Is Mr. Fuerth seriously telling me that on February 6th, when Mr. Shapiro is sitting in a jail in Israel and I'm supposed to be marching into a Tax Court and filing a petition, which is supposed to have some detail of explaining or arguing that he owes no taxes, I would have no opportunity to consult with my client about particular records, about particular items, that the Internal Revenue Service will or will not have.

There is absolutely no opportunity for me to do that. I can't file a petition with the Tax Court in those circumstances.

And I think that's what distinguishes this case so clearly from Enoch and from all the cases that follow that line.

Mr. Fuerth is absolutely right. Enoch sets down a conjunctive standard. It says you have to meet two criteria.
48 But the standards of Enoch, what Enoch is talking about, is a jeopardy assessment that meets the constitutional standard; and that is where Mr. Fuerth is all wrong.

This jeopardy assessment doesn't meet the constitutional standard because it doesn't meet what Justice Brandeis said: "There are minimum constitutional standards," in Phillips versus Commissioner in 1931, which is that there be merely a postponement of the judicial inquiry; that there be an opportunity later on to litigate that matter.

If Mr. Shapiro were in the United States and if he were entitled to remain in the United States until the tax issue is resolved, we could have no dispute with the jeopardy assessment

standard. Enoch would be clearly right because in that case we would have to wait until we get our day in court in the Tax Court.

But where the United States on the one hand is saying to him, "Now, unless you file with the Tax Court within 90 days of the date we give you this notice," and then with the other hand, saying, "We'll shove you out the door and you can not be in the United States and you are in jail in Israel," then they are denying him the right, as Justice Brandeis, Your Honor, said, is the very premise of the whole jeopardy assessment procedure.

So another exception to Enoch, which is an exception that I think the Court recognized in that opinion, is that
49 there may be instances where the judicial inquiry is totally foreclosed. And if that's true, you don't have to meet those two standards because that's just an unconstitutional jeopardy assessment.

That brings me to the question of the complaint, Mr. Shapiro verified it; I verified it because there were terms regarding that agreement that I entered into. I had discussions with the Department of State.

But I don't rely merely on the allegation. I direct Your Honor's attention to Exhibit 1 of the complaint. That's a letter from the Department of State to me dated September 19, 1973.

And the opening paragraph in it states that "In a meeting in Mr. Mark Feldman's office"—he's the deputy legal advisor—"you,"—that's me—"indicated that your client, Samuel Shapiro, would drop all litigation in connection with his pending extradition and surrender to Israeli authorities if he could be given certain assurances."

Now, Mr. Rankin has made it appear that the Department of State was acting in a gratuitous, voluntary assistance to me and Mr. Shapiro in doing us a favor.

We had a petition of Certiorari pending in the Supreme Court. And, although it was not reflected in the pleadings, I will tell Your Honor that I told the Department of State that I had serious doubts as to whether the Department of
50 State internal procedures on extradition matters were sufficient—how they could withstand judicial challenge.

And I indicated to them that it was very likely that I might institute a proceeding in a court of law challenging the State Department's procedures.

They did not want that challenge. And there was an agreement pursuant to that and pursuant to my repetition of an offer that I made the very first day that I knew that I was representing Mr. Shapiro, when I indicated to the United States Attorney that this man wants to go back to Israel, is ready to go back and stand trial so long as he knows he won't languish in a jail in Israel, so long as he knows that he will be released on bail here.

The United States Attorney was not interested in picking that up. He just wanted to pursue the case and get the man extradited.

But when I raised that in the Department of State, they said, and I think quite properly, "That's a very reasonable request. Let's see if the Israelis will go along with it."

By that time, his wife was also pregnant; so the first condition came up as well.

As a result of those discussions, the diplomatic notes were exchanged.

But I call again Your Honor's attention to page 2 of that letter. And, again, this is not simply my allegation. It's
51 a letter from the Department of State when they were trying to get me promptly to drop that petition for Certiorari rather than write directly to the Attorney General of Israel, which I had done to make sure that the terms had been agreed upon by Israel.

And on that day the Department of State says to me: "I fail to see why it should be necessary to demand any greater assurances than you now have since you literally have a promise from the Government of Israel to the Government of the United States."

Then it goes on to say: "Your decision to write the Ministry of Justice," which I did, "is a delaying tactic"—which I deny—"embarrassing the Governments of Israel and the United States and not within the arrangement worked out between you and Israel or that between you and the Department of State."

In other words, they are recognizing that I worked out an arrangement with Israel and with the Department of State through the Department of State; but there was an arrangement, at least a tripartite, and I submit with the Department of Justice as well, a four-part arrangement.

The only answer I received from those two departments when I called them in great anger on December 6th, when I heard that my clent's assets had been frozen, was a statement of shock and surprise.

52 "I.R.S.? Well, how could I.R.S. go out and do this? We didn't know anything about it."

When I speak to I.R.S., I.R.S. says: "Well, they can't bind us. We're a separate agency."

That was the defense that I got from the Internal Revenue Service.

"We don't care what the Department of State has done and the Department of Justice. We're a separate agency and we didn't—we were not a party to any of the agreements, and we don't know anything at all about those terms."

But I submit to Your Honor that they are a part of the United States; that they can't with the one hand be saying to this man: "Because you're going to be extradited, you are going to forfeit $92,000.00."

And that is really what they said.

Now, our request to this Court is not—and we are not here challenging extradition and, as I say, Mr. Shapiro was perfectly willing, I dare say, eager, when I told him on December 6th or on December 7th: "Look, what's happened is that this has been postponed for a week." That isn't what he wanted. He was ready to go ahead and surrender and go over to Israel and defend himself.

And I told him all of this had been postponed for a week.

53 All that he wants is to be able to have those assets be able to be used for his release on bail in Israel. He is ready to go this Sunday if those assets are released and he is, therefore, able to be released on bail.

Now, Mr. Rankin says: "We were not a party of guaranteeing his release on bail in Israel."

Of course, the United States is not a party. I never asked the United States to guarantee his release on bail in Israel or to give him the funds.

All I wanted—and I think I am entitled to from the other party to a contract, a contract in good faith, is that they not affirmatively interefere to take my clients assets, which he is relying on to be released on bail.

Now, they knew that those assets were going to be used because I spoke with Mr. Stein on the telephone and I very specifically made reference to the fact that I needed a certification from the Marshal on December 9th, when Mr. Shapiro would be surrendered, so that we could properly get these funds released so he could be released on bail in Israel. They knew that that's what is was going to be used for.

They may not have communicated to the Internal Revenue Service. I don't think these gentlemen are acting in, you know, total bad faith. I don't accuse them of that.

I was with the Government for a long period of time myself, and I know it's a big government. And I know that one arm of the Government sometimes doesn't know what the other

54 one does.

But I think that when it learns what the other arm of Government does, then it's got a duty to make its actions consistent with what the other arm of Government has recommended.

The COURT. That may well be, but what about the Congress of the United States which enacts the Internal Revenue laws, as set forth in Title 26 of the United States Code, which spell out certain precedural remedies for setting aside an assessment such as was made here?

Mr. LEWIN. I think that's right, and I think that applies in 99 and 99/100 percent of the cases.

But there may be a situation, and I think this is it. And I think Mr. Fuerth admitted it in answer to Your Honor's question.

There may well be a situation where the application of that statute becomes unconstitutional as applied to a particular individual.

And we submit—I can't think of a more classic instance.

The one that Mr. Fuerth cited—I don't think met those standards. I think there ultimately was, as he said, a tribunal in that respect that reviewed it.

But I think here for the United States or for Congress assuming Congress passed a statute and said, "In regard to all extraditees, we immediately seize all their assets and there is

55 no remedy at all"—Congress could pass that statute; this Court, I am sure, would strike it down.

And I think that is really what the Internal Revenue Service has done in this case and in a practical way: They said with regard to this man's being extradited, two days—two days, Your Honor, not three months, when a counsel would come in

to them, could open the books, and could say, "Well, now, look, there is not liability here; and here are the assets that the man brought from Europe."

But two days before he leaves, they say, "All right, Now we are going to freeze all of that money."

Now, I think Your Honor's suggestion is what seems to me to be a remedy, certainly, which is that if the extradition is delayed until such time as the Internal Revenue Service files its notice and there is litigation on that, that's one remedy.

Another remedy is simply to lift those jeopardy assessments, which I submit the Court has the power to do because they are unconstitutional as applied to this set of circumstances.

The COURT. Well, how about this Court's jurisdiction to do that?

Mr. LEWIN. I think this Court does have jurisdiction. It has jurisdiction . . .

The COURT. Under what statute?

56 Mr. LEWIN. It has it under—you mean this Court as opposed to the one in the Southern District of New York?

I think generally the case should come in . . .

The COURT. Why does this Court have jurisdiction?

Mr. LEWIN. This Court has jurisdiction because it is a suit against Government officials, as Your Honor said, under the mandamus statute, under 1361.

I think the Court has jurisdiction because it is an action under the Constitution and laws of the United States in which—by combination—maybe I didn't finish my point when I first stood up.

I am bringing this action here because it's a combination of the actions by the Secretary of State, the Department of State, the Department of Justice, and the Internal Revenue Service that deprives this man of his constitutional rights.

My main grievance is with the Internal Revenue Service because of what they have done. I think we have resolved matters with the Department of Justice and the Department of State.

But if the Departments of Justice and State insist on proceeding in light of the Internal Revenue Service's action, we submit that they should be enjoined or the Internal Revenue Service should be enjoined.

But I had to join all of these parties here, and that's why I brought the action. And I think this is the proper

57 forum.

This isn't a case—I haven't read the one in 351 Fed. Second that Mr. Rankin—but that sounds to me from what he said that that was a case that involved only North Carolina . . .

The COURT. Well, we are going to go look at it.

Mr. LEWIN. Nothing was done in the District of Columbia here.

There were letters. There were negotiations.

I must admit, Your Honor, as a very practical circumstance, the amount of time that I have had since this thunderbolt last Thursday—I flew up to New York to discuss with the Internal Revenue Service; I drafted that letter; I spoke with these people. It would be an extreme hardship for me to file this suit up in the Southern District of New York and fly up there with all the papers.

I am here. My client retained a Washington counsel on this. And in all honesty, I think if there is to be any hearing in this as to what the terms of the agreement were, I think the Department of State is here and the Department of Justice is here, the real parties to that agreement are here.

The COURT. Would you have any objection to the Court's transferring this to the Southern District of New York?

Mr. LEWIN. Well, I would have objection, Your Honor, unless Your Honor were to grant a temporary restraining order for a ten-day period, let's say, and then have a hearing in

58 the Southern District of New York.

I think, really, the witnesses are here. I think for the convenience of the parties it's better here; and, as I say, my main point is we're in court today.

This man attempted to surrender under the extradition warrant on a date set for extradition. He is not interested in defying any law.

If Sunday is the date set for extradition, I just don't see practically—here it is Thursday afternoon at almost 4:00 o'clock—I've come into court and had to explain all of this in my papers as quickly as possible. I don't know what remedy or how soon I could get any remedy.

The COURT. All right. Thank you very much.

572-247 O - 75 - 5

The Court will retire to chambers and come back and announce its decision.

Mr. FUERTH. Your Honor, may I just make one suggestion?

The COURT. All right.

What is it, Mr. Fuerth?

Mr. FUERTH. One thing occurred to me, Your Honor. You asked me for a case which involved extradition matters, and I didn't think about it at the time.

The COURT. All right. Give it to my law clerk.

Mr. FUERTH. Okay.

[Thereupon, the Court recessed at 4:52 p.m.]

[Following the afore-mentioned recess, the Court reconvened at 5:15 p.m.]

59 The COURT. Let the Court take this opportunity to welcome its good friend Mr. Aikens and his associate, Mr. Zimmerman, with whom the Court has had a very pleasant and proper and interesting relationship for many years.

The Court has before it a complaint filed by one, Samuel Shapiro, and his wife, Bella Shapiro, of Monsey, New York, versus the Secretary of State, the Commissioner of Internal Revenue, and the Acting Attorney General of the United States.

This is an action brought under Sections 1331 and 1361 of Title 28 United States Code and arises under the Constitution and laws of the United States.

It is alleged also that the controversy exceeds the amount of $10,000.00.

It is also alleged that the jurisdiction of this Court is invoked under Section 1332 of Title 28.

Most of the facts in this case are undisputed as set forth in the verified complaint now before the Court; and, therefore, the Court will not waste counsel's time to review all of the facts in detail which have already been recounted not only by the Court but by counsel in extensive argument.

To come back, however, the complaint alleges that the Commissioner of Internal Revenue and his agents have levied an assessment upon certain of plaintiffs' funds located in Chemical Bank of West Nyack, New York; the Nanuet National Bank of Monsey, New York; the Times Savings Bank at Forty-eighth Street in New York; and Fred Topper of 85 Baxter

60 Street, New York, New York; and any other places where such notices of levy have been served respecting plaintiffs' funds.

The complaint seeks to have the action of the I.R.S. set aside and seeks today to have the Court enter a temporary restraining order, which would restrain the Department of Justice and its agent, the United States Marshal for the Southern District of New York, Mr. Thomas E. Ferrandina, to refrain from executing a warrant of extradition for the plaintiff issued by the Secretary of State until the issuance by the Internal Revenue Commissioner of its notice of deficiency as required by 26 U.S.C. 6861, until such time as plaintiffs have had an opportunity to contest the legality of the jeopardy assessment made under Section 6851 of Title 26.

The Government, through Mr. Stein, has made a rather persuasive argument here, that the Government of the United States depends for its very existence in large measure upon the collection of income and other taxes. And the Congress of the United States has indicated support for that proposition by enacting what is generally known as an anti-injunction statute.

And the same general principle has been recognized by the Supreme Court of the United States in the case of Enoch versus Williams Packing Company. That case was decided in 1962 and is cited and found at 370 U.S., page 1.

And therein the Court held that it did have jurisdic-

61 tion to enter an injunction to prevent the defendant in that case from denying the plaintiff its tax-exempt status for as long as its operations did not conflict with its amended exempt application.

Now, the anti-injunction statute which the Court alluded to earlier does not bar the equitable relief here and neither does the Williams Packing Company case just referred to.

And after listening to the facts as outlined by counsel and reading them in the verified complaint in the case at bar and referring to the case of Smith versus Katzenbach, a decision of the Court of Appeals in this Circuit and cited at 351 Fed. Second 810, in 1965, by a panel consisting of Judges Fahy, Burger, and Leventhal, Judge Leventhal writing for the Court—there Judge Leventhal did suggest that want of equity jurisdiction while not jurisdictional in the sense of the power of the Court to decide the case, is a principle of such moment that it is properly raised even on the foregoing motion and has particular importance when the Court is being asked, in effect, to take action in anticipation of a criminal proceeding in another forum.

However, Judge Leventhal, in writing for the Court in the Smith case, which this Court is now referring, mentions that "The federal judicial system contemplates supervision by the Federal District Courts of the nation over the Government attorneys and enforcement officers acting within their
62 District, a supervisory jurisdiction possessed, in turn, on review by the Federal Courts of Appeal and ultimately by the Supreme Court of the United States."

Now, Judge Leventhal also said this, and I quote again: "To gain the perspective needful for this case, we express our canvass beyond the traditional rubric of adequacy of remedy at law.

"A Court properly exercises its discretionary powers by withholding relief that may involve the injection into criminal proceedings in another forum, particularly where it adheres to a policy indicated by Congress."

And further quoting, again, Judge Leventhal said: "Factors of public interest involved in the optimum distribution of Court burdens with appropriate concern for localities of origin and impact of litigated controversies are properly taken into account in the exercise of judicial discretion."

And most importantly in the eyes of this Court, Judge Leventhal also said the following, which the Court quotes again: "Such broad considerations of public interest are appropriately considered by Courts, in going further, both to give and withhold equitable relief than is customary only when private interests are involved."

Now, it seems to this Court at least in the brief time available to it to examine the authorities, that there is a serious question of the denial of procedural due process that
63 may have resulted and may well, in fact, result to the plaintiff in the case at bar unless and until he has an opportunity to personally appear to participate and assist his counsel in the litigation of the fact disputes arising out of the action set forth in the complaint by the Commissioner of Internal Revenue and his agents, servants, and employees.

From the facts in this case, it does not appear to this Court at least that the plaintiff can fully and adequately litigate the question of the legality of the assessment by long distance while in jail in Israel.

The facts in this case indicate to the Court that this is a very extraordinary, unusual circumstance, one that Courts are not often called upon to deal with.

To deny these plaintiffs the equitable relief that they, in effect, seek would be to leave them at the mercy of an all-powerful Government without an adequate remedy at law.

It further appears that granting of the injunctive relief in this case and the temporary restraining order in no way would burden the Government and will provide only for an opportunity to have the determination to take these monies belonging to the plaintiffs, or either of them, litigated in accordance with the requirements of procedural due process.

Therefore, this Court finds that the petitioner or plaintiffs in the instant case would be irreparably injured unless the Court issues the temporary restraining order.

64 Secondly, the Court finds that the issuance of the temporary restraining order would not substantially harm other interested parties—and that is to say either the Government of the United States would not be harmed and neither would the State of Israel.

It is also axiomatic that the public interest would be served in this case for the Court to issue a temporary restraining order so that it, as well as counsel, would have a better opportunity to resolve the issue of the propriety of the issuance of this injunction and also the propriety of the issuance of the levies or the tax assessments or the assessments, whatever they may be called, against the funds owned by the plaintiffs and each of them or either of them.

Accordingly, and for all of the reasons given by the Court, particularly the appearance that there has been a denial of the procedural due process here and that this case presents a factual situation which comes within the exception of the Enoch case and that the Enoch case is not a bar to the result announced by the Court.

The Court will sign a temporary restraining order.

The COURT. Madam clerk, set the matter down for an early hearing as soon as possible.

Counsel for the plaintiff will present an appropriate order in accordance with this brief opinion.

Mr. RANKIN. If the Court please, if we could address
65 a date for a preliminary injunction, the Government would appreciate if the Court could expedite that hearing at least within five days, if possible.

I don't know whether plaintiffs have filed a motion for a preliminary injunction, which should be in their papers.

The COURT. I believe I saw it in a motion for preliminary injunction.

I will be glad to accommodate you to that extent.

Mr. LEWIN. Yes, Your Honor.

The only thing, I do have another motion for a preliminary injunction on before Judge Gasch for Tuesday afternoon. But we will be ready to go for a preliminary injunction as soon as, I think, after Tuesday afternoon, if a date can be set.

The DEPUTY CLERK. Do you have a proposed order?

Mr. LEWIN. Well, we had a proposed order, Your Honor.

Might I get some clarification because we were unsure about the nature of the remedy.

Am I to understand that Your Honor is saying that there should be a delay of the extradition?

We had a proposed temporary restraining order in which we had two, sort of alternative, paragraphs; and I'm not sure that . . .

The COURT. All right.

Let me stop and look at this.

[The Court looks at the proposed order.]

66 The COURT. You will have to draw another order to make it conform to the opinion of the Court. You can discuss with the reporter what I said.

You will also have to provide for the posting of a sufficient bond and surety; and I will fix the bond at the amount of $1,000.00 surety or $100.00 in cash.

Mr. LEWIN. All right.

Yes, Your Honor.

But what I understand what Your Honor has essentially said is that . . .

The COURT. Everything will remain in the status quo until such time as the Court has an opportunity to hear the matter on the motion for a preliminary injunction.

Mr. LEWIN. So that there will be no extradition until that time?

The COURT. That's correct.

Mr. LEWIN. By Your Honor's permission, there is one more matter: In the course of the argument, I think counsel for the Government indicated that the warrant is now in the hands of the Israel Government.

Now, I don't know what their reaction to this action will be.

The COURT. You can put a provision in there that nothing will be done by the United States Marshal in the Southern District of New York or anybody acting under the jurisdic-
67 tion of the Director of the United States Marshal's Service to execute that warrant until such time that this Court has had an adequate opportunity to hear arguments both from the Government and from plaintiffs with respect thereto.

Mr. LEWIN. Or to take the plaintiff in physical custody because he stands . . .

The COURT. All right.

I will agree to that, too.

Mr. LEWIN. Thank you.

Mr. RANKIN. One question, Your Honor: If the order is drawn and granted certain relief regarding the levies that have been executed, we would request the right to come back in and argue further the issue of the bond.

Mr. LEWIN. Well, we're not . . .

Mr. RANKIN. Because we would suggest that $1,000.00 would be very insufficient if the order will release any of the money.

The COURT. No, I don't intend that the order will release any money.

Mr. RANKIN. Very well.

The COURT. Not at all. I didn't mean that. I don't think I said that in the record.

Mr. RANKIN. I don't think you did, Your Honor; but plaintiff is writing the order and I didn't know and I . . .

The COURT. Well, now, wait a minute.

68 Mr. RANKIN. . . . that's all.

The COURT. Mr. Lewin, I expect you to engage in the professional courtesy, show the order to Mr. Rankin so he can get in touch with his associates. I am not going to sign any order that you submit until they see it and they indicate that they have seen it in writing.

Mr. Zimmerman knows that, if anybody in the courtroom knows it.

Am I right, Mr. Zimmerman?

Mr. Zimmerman. Yes, Your Honor.

The COURT. All right.

Mr. LEWIN. I have no other intention, Your Honor, and I have acted that way with Mr. Zimmerman myself.

The COURT. He is not only a good adversary, but he is a good advocate.

The COURT. Thank you very much.

[Thereupon, the above-entitled matter was concluded at 5:32 p.m.]

[Jurat omitted in printing]

1 [Filed December 14, 1973]

United States District Court for the District of Columbia

[Title omitted in printing]

ORDER

Upon consideration of plaintiffs' Motion for a Temporary Restraining Order seeking to direct the lifting of Notices of Levy served by the agents of defendant Commissioner of Internal Revenue, (copies of which are attached to the pleadings in this case) or alternatively enjoining enforcement of the extradition warrant for plaintiff Samuel Shapiro, and a hearing on this motion having been held on December 13, 1973, and after consideration of the verified complaint, all the pleadings on file herein and arguments of counsel for the parties, and it appearing that unless the relief sought is granted irreparable injury to plaintiff will result in that plaintiff will be deprived of his liberty and his procedural due process rights to contest the legality of the seizure of his funds, and for the reasons stated more fully in the Court's opinion delivered orally at the conclusion of the hearing, it is, this 14th day of December, 1973.

Ordered that the defendants and all persons acting under their direction and supervision or in concert with them, are hereby restrained from executing any warrant for the extra-

2 diction of Samuel Shapiro, and from taking him into physical custody until further Order of this Court insofar as it may relate to any issue growing out of this action; and

It is further ordered that the plaintiff Samuel Shapiro, or counsel acting on his behalf, shall post a bond in the amount of $1,000 or cash in the amount of $100; and

It is further ordered that this order will expire at 5:00 p.m. December 19, 1973, and a hearing on a motion for a preliminary injunction will be held before this Court on December 19, 1973,

at 3:30 p.m. unless a different date is set by subsequent order of the Court; and

It is further ordered that insofar as the plaintiffs' application for Temporary Restraining Order seeks in any way to enjoin the Commissioner of Internal Revenue from making any assessments, filing any lien, or seizing any property so as to collect any tax assessments against the plaintiff Samuel Shapiro, such relief is denied without prejudice to the relief sought in the plaintiffs' Motion for a Preliminary Injunction.

CLEVELAND RIEBEY,
United States District Judge.

Dated: December 14, 1973, at 2:05 p.m.

Approved as to form:

MERLIN D. NUNLNER,
Counsel for Plaintiffs.

ROBERT S. RANKIN,
Counsel for Defendants.

A true copy.

JAMES F. DAVEY,
Clerk.

By Margaret L. Nopin,
Deputy Clerk.

[Filed December 17, 1973]

United States District Court for the District of Columbia

1 [Title omitted in printing]

PLAINTIFFS' INTERROGATORIES

To: Robert Rankin, Esquire, Assistant United States Attorney, United States Attorney's Office, District of Columbia, Washington, D.C.

The plaintiffs hereby request that the defendant Commissioner of Internal Revenue or an officer or agent thereof, answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories:

1. On what date did the Internal Revenue Service begin an investigation or inquiry of any kind regarding the income tax liability of Samuel Shapiro for 1970 or 1971?

2.(a) Was there any communication between officers or employees of the United States Department of Justice, including representatives of the Office of the United States Attorney for the Southern District of New York, with any agent of the Internal Revenue Service with regard to this matter?

2.(b) State the times, places and participants with regard to any such communication.

2.(c) State the contents of any such communication and whether done orally or in writing.

2 3. State the basis for the assessment in the amount of $6,843.68 for the income tax liability of Samuel Shapiro for 1970.

4. State the basis for the assessment of $85,876.73 for the income tax liability for Samuel Shapiro for 1971.

5.(a) State when agents of the Internal Revenue Service first learned that Samuel Shapiro would be extradited from the United States.

5.(b) State the name of the agent who received this information and from whom he received it.

5.(c) State the date which was communicated to the Internal Revenue Service as the date for the extradition for Samuel Shapiro.

6. State why no effort was made by the Internal Revenue Service to inquire from Mr. Shapiro directly regarding his financial records for 1970 and 1971 before the levying of the jeopardy assessment.

7. State what records, if any, of Samuel Shapiro would be relevant and material in establishing whether or not the assessments made on December 6, 1973, are valid.

8.(a) State the date on which the District Director of Internal Revenue approved the issuance of the jeopardy assessment made on December 6, 1973.

8.(b) State the names of the Internal Revenue Service officials who recommended and approved such jeopardy assessments.

3 9. State the precise liability that the Internal Revenue Service will assert in the notice of deficiency it will file with regard to Samuel Shapiro.

Please take notice that a copy of the answers to the above interrogatories should be served upon the undersigned counsel.

Plaintiffs hereby request that defendants respond to these interrogatories prior to the hearing on plaintiffs' motion for a preliminary injunction set for Wednesday, December 19, 1973 at 3:30 P.M.

NATHAN LEWIN,
MARTIN D. MINSKER,
MILLER, CASSIDY, LARROCA & LEWIN,
1320 19th Street NW., Suite 500,
Washington, D.C. 20036,
Attorneys for Plaintiffs.

Dated: December 17, 1973.

1 [Filed December 17, 1973]

United States District Court for the District of Columbia

[Title omitted in printing]

REQUEST FOR PRODUCTION, INSPECTION AND COPYING

To: Robert Rankin, Esquire, Assistant United States Attorney, United States Attorney's Office, District of Columbia, Washington, D.C.

Plaintiffs in this case hereby request that defendant Commissioner of Internal Revenue or an officer or agent thereof produce and make available for inspection and copying by plaintiffs' counsel the following:

1. Any memoranda or other writings authorizing the institution of a jeopardy assessment against the plaintiff Samuel Shapiro for taxes due for the years 1970 and 1971.

2. Any memoranda or other writings among agents or officers of the defendant Commissioner of Internal Revenue or between such agents and officers and agents and officers of defendant Acting Attorney General and defedant Secretary of State regarding the extradition proceedings against plaintift Samuel Shapiro.

3. Any memoranda or other writings relating to the preparation and service of the Notices of Levy on the property and assets of plaintiffs, copies of which are attached to the Memorandum of Points and Authorities in support of plain-

2 tiffs Motion for a Temporary Restraining Order.

This request is made pursuant to Federal Rule of Civil Procedure 34.

Plaintiffs hereby request that defendant respond to this request for Production, Inspection and Copying prior to the hear-

ing on plaintiffs' Motion for a Preliminary Injunction set for Wednesday, December 19, 1973 at 3.30 P.M.

Respectfully submitted,

NATHAN LEWIN,
MARTIN D. MINSKER,
MILLER, CASSIDY, LARROCA & LEWIN,
1320 19th Street NW., Suite 500,
Washington, D.C. 20036,
Attorneys for Plaintiffs.

[Certificate of service omitted in printing]

[Filed December 18, 1973]

1 In the United States District Court for the District of Columbia

[Title omitted in printing]

WASHINGTON, D.C.

The above-entitled matter came on for hearing before the Honorable Charles R. Richey, United States District Judge, at 2:00 o'clock p.m.

APPEARANCES

For the plaintiffs: MARTIN D. MINSKER, Esq.

For the defendants: ROBERT RANKIN, Esq., and STEPHEN FUERTH, Esq., Assistant United States Attorneys.

TOM DOURIAN, 6808 U.S. Court House, Washington, D.C 20001, official reporter.

2 TRANSCRIPT OF PROCEEDINGS

The COURT. Good afternoon, gentlemen.

I have, through my clerk, told you to come in this afternoon. I want to be as brief as possible, so that we can make a record here and determine what is best and what the court should legally do.

Do I understand plaintiff has an application to make to the court to shorten the time within which to answer certain interrogatories? Is that correct?

Mr. MINSKER. Yes, Your Honor.

The COURT. And you also want to order the production of certain documents.

Mr. MINSKER. Does Your Honor wish me to proceed? I can be very brief.

The COURT. Yes.

Mr. MINSKER. As Your Honor will recall, this matter is set for hearing tomorrow at 3:30 p.m., on a preliminary injunction.

The COURT. Right.

Mr. MINSKER. The temporary restraining order is presently set to expire at 5:00 p.m. on that date at the government's request.

The COURT. That is correct.

Mr. MINSKER. Let me state first that yesterday afternoon at approximatly 3:30 or 4:00 p.m., copies of the interrogatories and requests for production were delivered by hand to defense counsel, to Mr. Rankin.

The information sought here is in four categories, essentially:

One, the reasons why the jeopardy assessment was put off until the very eve of the extradition;

Two, the extent and nature of communications running between and among the defendant Commissioner of Internal Revenue and the defendants Departments of State and Justice, respecting the arrangements executed by these departments and with the State of Israel regarding plaintiff's application to remain free on bail in Israel;

Third, the basis for the jeopardy assessment; and,

Four, the actual amount which the Commissioner of Internal Revenue intends to claim in the ultimate notice of deficiency, as opposed to in the jeopardy assessment.

Those matters are directly relevant to material allegations in our complaint.

I specifically referred the court to paragraphs 29 and 27 of the complaint, and paragraph 22. I will not read them since the court has asked me to be expeditious. However, set forth therein are allegations that the jeopardy assessment was deliberately delayed until the eve of extradition; that there was no legitimate or lawful reason for the delay of the jeopardy assessment; that these facts constitute gross bad faith on the part of the Commissioner of Internal Revenue, and other material allegations elsewhere in the complaint setting forth, in essence, a patent denial of procedural due process in the combination of governmental power in the jeopardy assessment and the extradition.

Ordinarily, plaintiffs have a period of 45 days—excuse me—defendants have a period of 45 days from the filing of the complaint within which to respond to the requested discovery.

Obviously, if the temporary restraining order expires and if the hearing on the preliminary injunction is going to be held in the interim, we need to have that information or that response available before then.

For those reasons, we have urged the court under Rules 33 and 34 to foreshorten the time for a response, and in the event that privileges are asserted, we will ask the court to rule on those privileges.

I will stop there for now.

The COURT. All right. Thank you very much. Mr. Rankin.

Mr. RANKIN. Good afternoon, Your Honor.

Your Honor, the point we would like to make is obviously the time factor involved in plaintiff's request here.

The COURT. I am glad you raised that. Let me ask you this, Mr. Rankin:

There is not any question but what the court has the power under Rule 33 to shorten the time or to lengthen the time which parties may be required to answer interrogatories and you know that specifically.

However, I am going to ask you very candidly:

Is there any way, physically, whereby you and your able associates who appeared here the other day could make this information available before tomorrow?

Mr. RANKIN. There is a possibility, Your Honor, that it would be physically possible to get some of the information.

The COURT. All right. Do you agree that it goes to the alleged denial of procedural due process?

Mr. RANKIN. I beg your pardon, Your Honor?

The COURT. Do you agree that the production of these documents, and the answers to these interrogatories, go to the alleged denial of his rights to procedural due process?

Mr. RANKIN. I don't think so, Your Honor.

The COURT. You do not think so?

Mr. RANKIN. Well, possibly in part.

The COURT. I do not want to cut you off, and I want you to make any arguments you want to make.

Mr. RANKIN. I appreciate that.

The COURT. All right.

Mr. RANKIN. I would also like to suggest to the court that I have not seen or discussed with these various people the answers to these things.

What we are talking about are people in New York and documents in New York. Had the plaintiffs filed this lawsuit in the Southern District, they might have been able to get quick information.

552-247 O - 75 - 4

We have been in a difficult position, as you know, Your Honor, in expediting this preliminary injunction motion, in trying to get some papers before the court to help inform the court of our legal position with regard to temporary injunctive relief.

Obviously, we have had an intervening weekend. We have had snow. We have had difficulties with secretarial help. These are personal problems.

The COURT. Now, wait a minute. I am not going to let something like that work an injustice on you.

Mr. RANKIN. I understand that.

The COURT. Or the other side. I do not think that is fair to the government or to the plaintiffs.

Let me ask you this, if you will pardon me again.

Mr. RANKIN. Yes, sir.

The COURT. Would you like a little more time, a few days' more time?

Mr. RANKIN. For what, to respond to a request for discovery?

7 The COURT. And to prepare your response to their request for a preliminary injunction.

If you do, I will be delighted to give it to you, because I don't want you to be penalized.

Mr. RANKIN. I understand that, Your Honor.

The COURT. And, frankly, I want all the help you can give me.

Mr. RANKIN. I agree, Your Honor. We were the ones who wanted seriously to expedite this thing as much as possible, and we are trying our best to get the record complete from our point of view and get a memorandum to the court.

There is no doubt we are having difficulty doing it. Hopefully, we will be able to.

The COURT. Now, Mr. Rankin, if you want more time, I will tell you right now: I am going to give it to you. All you have to do is just sneeze, and I will grant it.

Mr. RANKIN. I would like to be able to sneeze right now, Your Honor, but——

The COURT. I will tell you something. I am concerned about this case, and I do not want to make a mistake in this case, or any other, for that matter.

I think it has serious implications insofar as the potential rights of the plaintiffs are concerned, and also the Government of the United States.

Mr. RANKIN. I am in full agreement, Your Honor.

8 The COURT. I have a duty to be fair to both of you, and I have to rely upon the lawyers to present a good work product.

If time intervenes and prevents that, why, the likelihood is increased that the court might err, and I do not like that.

Mr. RANKIN. I am in full agreement with that, Your Honor. However, we are under a temporary restraining order which would have to be extended to allow for additional time.

We have considerations on the other side of a very sensitive nature in a case such as this, and it is just a very difficult position to be in, very frankly.

The COURT. All right, sir.

Mr. RANKIN. I would like to go forward with our position with regard to these discovery requests, but we may possibly have to seek further relief on this preliminary injunction situation later.

Hopefully, we will not.

The COURT. If you do, I will be available tomorrow. On the other hand, I wish you would address yourself to these motions, these pending requests, with respect to interrogatories and for the production of documents.

Mr. RANKIN. If I may address them in a general way, Your Honor——

9 The COURT. Surely.

Mr. RANKIN [continuing]: I think it is clearly oppressive under the rules for plaintiffs to come in at the ninth hour, the day before a hearing is set, and seek discovery of a broad nature, as they do here.

Now, these people have known—they filed their lawsuit last Thursday. If they wanted additional information, they could have served interrogatories and a request for the production of documents on us on Thursday or Friday. We argued the temporary restraining order on last Thursday.

That would have given us a couple more days to consider it.

We received it late yesterday afternoon, and you know what the help situation was around the Court House yesterday afternoon.

The COURT. I do.

Mr. RANKIN. Now, we have had our people here today trying to draft papers. We simply do not have time, Your Honor, to respond to the interrogatories in the time that they want us to.

Now, be that as it may, as we view the issues before the court, we are not talking about the issues of a possible tax suit which may occur in the Tax Court or possibly in the Southern District of New York.

10 We are talking about a claim by a plaintiff for temporary injunctive relief, whether or not this court should exercise equity jurisdiction to hold up an extradition that has already been litigated numerous times in the courts.

Superimposed on that is the basic jurisdictional issue as to whether this court has any jurisdiction over the case at all, setting temporary injunctive relief aside.

We submit, Your Honor, those are clear issues of law. The necessary facts to decide those legal issues are before the court, and we hope to be able to present that to the court in a memorandum without any need for additional discovery into the merits of the case, which we feel this court simply does not have jurisdiction to conduct.

Certainly, we would come in with a motion for a protective order, or certainly objections along this line, if this court were to shorten our period of time.

Clearly, we have not had the opportunity to prepare an opposition to a motion to compel. But, in any event, the court is aware of our time problem.

We simply suggest that what plaintiffs are doing here is seeking a preliminary injunction, which, we might add, Your Honor, there is simply no motion for a preliminary injunction before the court. We have not been served with a motion.

The COURT. I thought there was one in the file.

Mr. RANKIN. We brought that up at the temporary

11 restraining order hearing, Your Honor.

The COURT. I apologize to you.

Mr. MINSKER. No, Your Honor, we did not file a motion. Under the rules, as I understand them, our motion must be filed before the hearing. We are working under the same pressure, and we are trying to prepare the formal motion which is going to set forth, I believe, essentially the same relief requested in the motion for a temporary restraining order.

It will be joined with a supporting memorandum, Your Honor.

Now, I thought I had undertaken with Mr. Rankin to agree upon a time to exchange their papers and our papers before

the hearing, so that both sides would have an opportunity to review the written file.

We have not been served with their opposition papers, either, and I am undertaking to do that at any time the hearing is set.

The COURT. Well, the hearing is going to be set, or it has already been set, for tomorrow. It has already been set.

Mr. MINSKER. I understand that. I meant to say at any time the government is ready to serve their papers, and, even, indeed, I am willing to exchange drafts. We are still now preparing the memorandum in support of the formal motion for a preliminary injunction.

12 Our prayer for a preliminary injunction is set forth in a complaint. As I understand Rule 12——

The COURT. I understand.

Mr. MINSKER [continuing]. Rule 112 of this Court——

The COURT. I understand.

Mr. MINSKER. Thank you, Your Honor.

Mr. RANKIN. That is a rather novel suggestion on the part of counsel: that we have to submit an opposition to a motion that has not even been filed yet at the same time that he files a motion.

Moreover, Rule 6(d) states that a written motion shall be served not later than five days before the time set for the hearing.

We knew at the time last Thursday when the court entered a temporary restraining order that we would be prepared to come in, in five days.

Now, the question came up as to whether or not there was a motion before the court, and we received assurances that there was preliminary injunctive relief being sought. Clearly, it has to be by a written motion.

There is none before the court.

Mr. MINSKER. Your Honor, may I respond to that, or shall I respond after counsel concludes?

The COURT. Let the government finish its argument,

13 and then I will hear from you fully and completely.

Mr. MINSKER. All right, sir.

Mr. RANKIN. Now, in any event, it would appear, Your Honor, that the type of preliminary injunctive relief that plaintiffs seek would be an injunction from this court to en-

join the extradition of the plaintiff, to allow him time to contest the tax assessments, which could be, if in the Tax Court, approximately one to three years; or if it were on a refund case in the Southern District, it could be from one to five years, approximately.

That is what this lawsuit is all about: a preliminary injunction to allow him to litigate in another court, not this court, another legal matter.

The COURT. Why do I not transfer this right now to the Southern District of New York?

Mr. RANKIN. We suggested, Your Honor, last Thursday that that court was the proper court with the jurisdiction, and that this court under the Smith case should not retain jurisdiction.

The COURT. Well, I have been thinking about it, so you had better be prepared to argue that tomorrow, both sides.

Mr. RANKIN. In any event, Your Honor, we are trying to put papers together to come in before this court tomorrow with some type of record which will assist the court and address the issues, as we see them, even though there is no motion
14 before the court.

We think that some of the questions that plaintiffs ask in the interrogatories may be answered, and many may not be. Many of the documents may be irrelevant to our legal position. But, in any event, we suggest that this motion should be denied; that there will be plenty of time for plaintiffs, if this court ever gets to the merits of this claim eventually, to conduct the necessary discovery.

The COURT. All right.

Do you want to argue further?

Mr. MINSKER. Your Honor, first, I apologize for interrupting government counsel.

With regard to the nature of our request, the government says that this goes to the merits of the case, but the government has raised the Enochs test as a bar to our relief. Now, we submit the Enochs test does not bar relief, but one of the requirements of Enochs relates to the showing of no possibility of recovery.

More importantly, the thrust of our discovery is addressed to the reasons why the jeopardy assessment was delayed. So we submit that it is directly, materially relevant to the questions to be decided on the preliminary injunction.

The COURT. You do not deny that it is physically impossible for them to answer these interrogatories and produce these documents by tomorrow?

15 Mr. MINSKER. Your Honor, if there are no documents, or a limited number of documents, that would not be the case. Now, I know that at the time of the hearing on the temporary restraining order, government counsel for the Commissioner of Internal Revenue represented to the court that he checked with counsel in New York and was able to ascertain that that counsel in New York knew the fact that extradition proceedings were in progress and that he was scheduled to leave by December 9th.

It is possible to check by telephone and also to check the records here in Washington, which, we suspect, may be equally relevant, to ascertain whether there are any documents, Your Honor.

In other words, Your Honor, if the answer is "no" to all of these determinations, that can be put—that can be given to us very quickly.

Obviously, Your Honor, we are not asking the impossible to be done.

The COURT. Would you be satisfied with verbal answers?

Mr. MINSKER. Your Honor, we would be satisfied with representations in writing which can later be sworn and filed of record.

If all that can be done is verbal answers, I would be satisfied to write them down; I would type them up myself; and we could get the representations in sworn form at a later
16 date.

That would be one possibility.

Now, Your Honor, another possibility, of course, is the request for further time. If the government feels that it cannot supply this information in time——

The COURT. They will come in and tell me tomorrow.

Mr. MINSKER. That is right.

I think they can do that on that occasion. They have certainly said they can supply some of the information before then.

Now, with regard to the timing of our application here, Your Honor, we also have been working under extreme time pressures.

For example, we did not even know that there was a jeopardy assessment in force until three days prior to the agreed-upon time of removal. That was December 6th.

Since then we have been working as fast as possible to draft up the temporary restraining order papers and the complaint.

After that we had to work on Friday. I was here all day with respect to getting the order out and filed.

There was no deliberate delay in serving the papers until Monday.

The COURT. Nobody is suggesting that.

Mr. MINSKER. And we do submit that the record
17 shows that we acted as expeditiously as possible.

Furthermore, the government counsel characterized our requested discovery as of a broad nature. We submit that an examination of the discovery shows that it has deliberately been kept as narrow as possible because of the time constraints involved.

I will stop at this point unless the court has any other questions the court wishes to ask me.

The COURT. I do not.

I am going to deny the plaintiffs request for production of documents at this time until after the court has had an opportunity to examine the plaintiffs' motion for a preliminary injunction and to examine the government's response thereto.

However, since the interrogatories may be answered in part and may be relevant to the issue of extraordinary circumstances, and whether the government will ultimately prevail on the merits, the court will order, and sign an order, to this effect:

The government shall be required to answer such interrogatories before tomorrow, orally or in writing, as reasonable and diligent effort may provide.

I will leave it to the good faith of Robert Rankin, as a respected member of the bar of this court and the United States Attorney's Office, to do the best he can, and that is all he and his associates.

18 The COURT. I am not going to reduce the time out of hand and be heavy-handed with the government, nor am I going to be heavy-handed with the plaintiff.

I will say to the plaintiff that this is a very unusual case, and it is very important. But you have the threshold problem here of a sister court having entered an order of extradition to

the State of Israel for what that court has determined to be an extraditable offense.

Now, you heard the court's oral opinion delivered from the bench the other day dealing with the question of a possible denial of procedural due process and the fact that this court, at least tentatively, concluded that this did not come within the prohibitions of the Enochs case, and, therefore, it signed the TRO.

However, I would remind counsel for the plaintiff that you have a very heavy burden to show under the particular circumstances of this case, and it might be very well for both you and the government to consent to a transfer of this case to the Southern District of New York.

That court, it seems to the undersigned at least, might be in a much better position to understand the overall implications of this particular case, having had it before it on a previous occasion.

But you have chosen your forum, and if you want to stick to it, this court will do its best to do justice.

19 Mr. MINSKER. Does the court wish to hear us now on that point or tomorrow?

The COURT. Well, I assume I will hear you tomorrow, if you can file your application.

Mr. MINSKER. Yes, Your Honor.

The COURT. I told you both that I would give you an immediate hearing. If you do not come in and you do not serve your papers on them and they do not respond to it, you cannot expect the court to pull your problem out of its hip pocket.

I am not going to shoot from the hip on this. I will tell you that right now, and you had better submit a clear and persuasive and well-written memorandum so that I can examine it and come to the proper and appropriate answer.

I realize that you are laboring under a difficult handicap. I was in the same position myself as a member of the bar not too long ago. I hope I never forget it, and I will never forget it.

The court will be in recess until 9:30 tomorrow morning.

Do you want to say anything else, Mr. Rankin?

Mr. RANKIN. Your Honor, Mr. Fuerth from the Department of Justice was ready to address the issue of the possible transfer of this matter, if the court would like to hear the government's position at this time.

20 The COURT. All right. Mr. Fuerth, the court is going to hear you.

Mr. FUERTH. Your Honor, I am not trying to force myself on the court. I merely am trying to indicate that I have done some research on the matter preliminarily, and I am willing to give the court the benefit of my thinking on the matter.

The COURT. All right.

Mr. FUERTH. Your Honor, essentially, my thinking is this:

That insofar as this particular suit seeks to attack the assessment, it, in effect, is in the form of a refund suit, really.

And the jurisdiction for a refund suit lies in the district where the taxpayer has his residence, which I think everyone here would agree would be New York.

So under no circumstances could a tax refund suit be brought in any other district, other than New York, or in the U.S. Court of Claims.

Of course, now in this case, to the extent that the tax was not paid, it would be our position there would be no jurisdiction.

What I am saying, Your Honor——

The COURT. Let me ask you this. This is one of the questions they want answered by virtue of their interrogatories.

21 Mr. FUERTH. Yes.

The COURT. Do you feel that your jeopardy assessment covers the full amount of any possible liability, whatever is involved?

Mr. FUERTH. It is a full-year assessment, yes, Your Honor.

The COURT. So it would cover the bond of $55,000 that is already deposited, or was deposited, as I understand it, and is still on deposit, and covered by the jeopardy assessment.

Is that amount sufficient to cover the amount of tax due?

Mr. FUERTH. It would be for one year, not for both years.

In other words, let me explain something, Your Honor. The $55,000 is the amount of the bond. The collateral which we have levied upon is only $35,000.

In other words, there is a total bond of $55,000 which was put up. There was collateral in a number of different bank accounts.

The COURT. Yes, I remember that.

Mr. FUERTH. That is in the total amount of $35,000, in round figures. There are some dollars and cents there. And that we have levied on.

Now, this would more than cover the year 1970, I
22 believe in the neighborhood of $7000 or $8000. It would not cover the year 1971, which is almost $80,000, a little over $80,000.

The COURT. $80,000?

Mr. FUERTH. Yes.

The COURT. Of money earned in the United States of America?

Mr. FUERTH. This is unreported income, yes.

The COURT. In the United States of America?

Mr. FUERTH. In the United States of America, yes, sir.

The COURT. All right.

Mr. FUERTH. Our position is simply, as to the first amount, as long as Mr. Shapiro remains within the United States, and as long as this money is paid over to us—I might add it has not been paid over to us at this point; it is merely under seizure—the proper jurisdiction for a refund suit would be in the Southern District of New York.

The COURT. Give my law clerk the citations to the Code and any cases that you have on that.

Thank you.

Mr. FUERTH. Thank you, Your Honor, for the opportunity to be heard.

The COURT. Do you have anything you want to submit?

Mr. MINSKER. Your Honor, we are prepared to re-
23 spond to these arguments tomorrow, if the court prefers.

Suffice it to say for the record, we do not consider this a suit for a refund, but, indeed, a suit only to preserve the opportunity for procedural due process in utilizing the provisions of the Code.

I know the court wishes to conclude. We will respond at length to these arguments tomorrow.

The COURT. I would assume you anticipate this argument.

Mr. MINSKER. Yes, Your Honor.

The COURT. It is a pretty fundamental, threshhold question that the court is going to have to deal with.

Mr. MINSKER. I simply do not want to permit the characterization of the suit to go unrseponded to.

The COURT. I know you are under pressure. Yes, Mr. Rankin.

Mr. RANKIN. Your Honor, if I might just clarify your order with regard to interrogatories, as I understand it, the court

wants us to make every effort to respond to all of the interrogatories by tomorrow.

The COURT. If you reasonably can. You do not have to put it in writing. You can give it to them orally.

Mr. RANKIN. I presume we also reserve our right, Your Honor, to object; that you have not ruled that we have to respond to each one.

24 The COURT. That is correct.

Mr. RANKIN. Very well.

[Whereupon, at this point the court adjourned.]

[Jurat omitted in printing]

1 [Filed December 19, 1973]

United States District Court for the District of Columbia

[Title omitted in printing]

MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs, pursuant to Rule 65 of the Federal Rules of Civil Procedure and upon the complaint, pleadings, memoranda, affidavits and Exhibits filed in support of this motion, and the hearings held herein, hereby move the Court for a preliminary injunction and as grounds therefor state as follows:

(1) On December 14, 1973, this Court entered an order which, *inter alia,* restrains the extradition of plaintiff Samuel Shapiro, and denied without prejudice to the relief sought in plaintiffs' Motion for a Preliminary Injunction the prayer for an order enjoining the jeopardy assessment in this case. Said order set a hearing on the preliminary injunction for December 19, 1973 at 3:30 p.m. Said order expires at 5:00 p.m. on December 19, 1973.

(2) Pursuant to arrangements concluded with the Department of State, the Department of Justice, and the State of Israel, plaintiff Samuel Shapiro agreed to waive further

2 rights to litigate in the United States Supreme Court and the State Department his extradition to the State of Israel in return for the agreement of the State of Israel that upon the posting of a bond in the amount of 250,000 pounds plaintiff would be permitted to remain at liberty during the course of his trial there. All parties to this arrangement knew that plaintiff intended and needed to utilize funds presently posted as security in the United States for plaintiff's appearance in the extradition proceedings in the United States as partial security for the bond demanded by the State of Israel.

(3) Pursuant to these arrangements, plaintiff agreed voluntarily to surrender himself for removal to the State of Israel on Sunday, December 9, 1973.

(4) The agents of the Internal Revenue Service knew of the pendency of the extradition proceedings and of the intention of the State of Israel to seek plaintiff's removal and of plaintiff's scheduled removal on December 9, 1973. These agents were in contact with agents of the Department of Justice conducting the extradition proceedings on behalf of the United States. These agents knew, or with an exercise of due diligence could have known, of all the arrangements set forth
3 hereinabove and in the complaint in this action.

(5) Nonetheless, without any lawful reason, these agents deliberately delayed the commencement of proceedings against plaintiff until three days before his scheduled removal from the jurisdiction of the United States, and then, sometime in the afternoon of December 6, 1973, without prior notice or warning of any kind to plaintiff or counsel, served Notices of Levy on banks and individuals holding the funds contemplated by plaintiff, the Departmet of State, the Department of Justice and the State of Israel to be utilized as bond pursuant to the arrangements concluded with these branches of the United States Government. The Notices of Levy were purportedly served pursuant to the jeopardy assessment procedures set forth at 26 U.S.C. § 6861.

(6) If the extradition of plaintiff is permitted to go forward while the Notices of Levy remain in force, plaintiff will be deprived of his right to contest the legality of the Government's seizure of his property, his right to liberty on bail during his trial in Israel as expressly and impliedly represented by the Government of the United States and his right to litigate further the legality of his extradition, all in violation of his rights under 26 U.S.C. §§ 6213(a), 6861, the Due Process Clause of the Fifth Amendment and the right to the assistance of counsel in defending against tax assessments, as more fully set forth in the pleadings filed herewith.

4 Wherefore, plaintiffs move this Court to enter an order:

(1) Directing defendant Commissioner of Internal Revenue, the agents, employees, officers, and representatives of the Internal Revenue Service, and all persons acting in concert with them or under their supervision, to take all action necessary to lift the Notices of Levy presently in force on plaintiff's funds and located at the following places: Chemical Bank, Route 59, West Nyack, New York 10960; Nanuet National Bank, Route 59, Monsey, New York; The Dime Savings Bank, Fifth Avenue at 48th Street, New York, New York; Fred Topper, 85 Baxter Street, New York, New York; and any other places where such Notices of Levy have been served respecting plaintiffs' funds; or alternatively

(2) Enjoining all defendants, their officers, agents, representatives and all persons under their supervision and acting in concert with them from executing any warrant for the extradition of Sameul Shapiro and from taking him into physical custody as it may relate to any issue growing out of this action until such time as plaintiff Sameul Shapiro shall have had opportunity to contest the tax assessment made against him on December 6, 1973, as provided in the Internal Revenue Code and other applicable provisions of the laws of the United States;

5 (3) Granting such other and further relief as the Court may deem just and proper.

Respectfully submitted,

HERBERT J. MILLER, JR.,
NATHAN LEWIN,
MARTIN D. MINSKER,
MILLER, CASSIDY, LARROCA & LEWIN,
1320 19th Street NW., Suite 500,
Washington, D.C. 20036 (202) 293-6400,
Attorneys for Plaintiffs.

[Filed December 19, 1973]

United States District Court for the District of Columbia

MOTION TO DISMISS

Defendants, by their undersigned attorneys, respectfully move the Court to dismiss this action for failure of the plaintiffs to state a claim upon which relief may be granted and for lack of jurisdiction over the parties or the subject matter of this action in that (a) the Court lacks jurisdiction and competence to enjoin the execution of an extradition warrant, (b) the Court lacks jurisdiction over the United States Marshal for the Southern District of New York, (c) the Court lacks jurisdiction to hear unconsented suits against the United States, (d) the Court in this case lacks jurisdiction to grant injunctive relief relating to Internal Revenue Service jeopardy assessments, and (e) the Court lacks jurisdiction at this time to determine whether plaintiffs' will be denied due process in subsequent tax litigation.

In support of this motion and incorporated herein by attachment as Government Exhibits 1–9 are certified copies of documents relating to this action and as Government Exhibits 10 and 11 are two affidavits of Thomas J. Tallerico.

HAROLD H. TITUS, JR.,
United States Attorney.
ARNOLD T. AIKENS,
Assistant United States Attorney.
ROBERT S. RANKIN, JR.,
Assistant United States Attorney.

[Filed December 19, 1973]

In the United States District Court for the District of Columbia

[Title omitted in printing]

WASHINGTON, D.C.

The above-entitled matter came on for hearing before the Honorable Charles R. Richey, United States District Judge, at three o'clock p.m.

APPEARANCES

[The same as heretofore noted.]

TOM DOURIAN, 6808 U.S. Court House, Washington, D.C. 20001, official reporter.

TRANSCRIPT OF PROCEEDINGS

The COURT. All right, gentlemen. May we proceed.

Mr. LEWIN. Good afternoon, Your Honor.

Might I just begin by calling attention to a housekeeping matter. I notice that the time is 4:15, and I believe under Your Honor's temporary restraining order, which you signed, there was some provision in there that it was to expire.

The COURT. At 5:00 o'clock.

Mr. LEWIN [continuing]. At 5:00 o clock. Since it is possible, I suppose, that this hearing may run beyond that time, can we assume, with the understanding of the government, that that would expire on Your Honor's action on the present pending motion?

I just raise that, because I just do not want the time to lapse without——

The COURT. That is something you should take up with the other side. You will have to take that up with them.

Mr. LEWIN. All right. Might I just ask Your Honor simply——

The COURT. Because I do not know what the court is going to do until I hear your arguments.

572-247 O - 75 - 7

Mr. LEWIN. I appreciate that, Your Honor.

Might I just say, as another preliminary housekeeping matter, that because of, I suppose, the expedited schedule
3 in this case, I received a copy of the government's papers just before 3:30 this afternoon, which includes an extensive discussion of legal points, which I will refer to in my argument.

But I just wanted that matter simply placed on the record at the present time, because we may wish to respond to both the factual allegations and the legal assertions made in there.

The COURT. All right. How much time do you need, sir?

Mr. LEWIN. Do you mean in terms of a written brief or just argument?

The COURT. No. How much time do you need this afternoon?

Mr. LEWIN. I think right now, just in terms of argument, I would need 15 or 20 minutes.

The COURT. All right. I will give you 15 minutes, sir.

Mr. LEWIN. Thank you.

This case concerns, as I believe Your Honor is aware, the question of the validity, the constitutional validity, of a jeopardy assessment made upon an individual residing in the United States, married to an American citizen, one working day before he was scheduled to surrender pursuant to an extradition warrant under a voluntary agreement that had been worked out with the Department of State.

4 Now, we did not, prior to today, have copies of the papers that have been exchanged between the United States and Israel, between the Department of State and Israel.

But we did receive them just before we walked into the court, and they are attachments, and I think that really what they say—they are attachments to the government's response.

What they say, as well as what the answers, the sketchy answers to interrogatories that we have received say, is really quite interesting, and I think sustain the plaintiffs' position.

Our basic legal argument, Your Honor, is that it is—and this is the argument in its broadest form, and I will proceed from that to narrowing it to the facts of this case, but our argument in its broadest form is that Congress has set up a taxing scheme under which it has given the Commissioner of the Internal Revenue certain powers, and at times certain extreme powers.

But that the exercise of those powers, particularly the power to impose a jeopardy assessment, on the eve of an extradition

is in our view, in any event, unconstitutional. Because it amounts not to a tax, but to a forfeiture, Your Honor.

The government says that, if a person in the position of the plaintiff in this case, one who is surrendering himself,
5 and would be out of the country a day after the jeopardy assessment is served, has, in theory, an opportunity to go into the Tax Court some time in February, or 90 days after February, when they serve a 60-day notice, then that is sufficient for constitutional purposes.

We say that in no practical sense can that be viewed as being sufficient for constitutional purposes; and that, for that reason, a jeopardy assessment of that kind simply cannot stand.

Now, we are here before Your Honor in this case, both on the temporary restraining order and today on the preliminary injunction, not to enjoin an extradition.

I think we should make that clear, and I think we tried to make it clear the other day.

We have not come, and we did not come to court in any way, seeking that relief, as such.

The COURT. Is that not the effect of it, though?

Mr. LEWIN. Well, no, Your Honor. What we have done—what we have done—is sought to remove from the plaintiff the forfeiture that is imposed by the Internal Revenue Service.

Now, that can be done in either one of two ways:

It can be done by an order removing the jeopardy assessment, which, we submit, the court has ample authority to do, notwithstanding what the government says. The court has
6 more than ample authority to direct the Commissioner of the Internal Revenue to remove the jeopardy assessment when that jeopardy assessment would be unconstitutional.

Now, as an alternative—and we propose it only as an alternative—the court has the authority to say to the Secretary of State and to the Department of Justice: Now, you must defer any action you will take which will prevent this man from contesting his tax liability until such time as he has an opportunity to challenge it.

In other words, what we are saying is that the government, by common fairness, by constitutional standards, can do one of two things:

It can extradite this individual and leave for a later date the question of his tax liability in the ordinary course, or it can say:

We wish to impose the tax liability, and, therefore, we delay his extradition.

Let us just assume for a hypothetical that the United States Government were interested in a criminal prosecution of somebody who was going to be extradited.

I submit it would plainly be unconstitutional to say to a man who was going to be extradited tomorrow: You are scheduled for trial on your criminal case the day after tomorrow, and if you do not appear, then you will simply be tried in absentia, and you can be convicted in absentia.

I think, plainly, if the United States were to file an
7 indictment and have a criminal trial on those circumstances, any court in the country would say the United States must choose between either of those two alternatives. It must either prosecute the man, and extradition treaties have ample provision for delaying extradition in order to complete proceedings against the individual who is being extradited, or the government could say: We defer on the criminal prosecution until such time as the indicted defendant returns and permit him to be extradited.

Now, the effect, on the other hand, of what the government has done in this case is to put this plaintiff and his wife, who is also a plaintiff, and who is an innocent third party, to an absolutely impossible situation.

The government has essentially said to these people: We are going to do both. We are going to throw you out of the country. We are going to surrender you over to a foreign government, and at the same time we are proceeding with a Tax Court procedure which essentially says that we filed a notice. If you do not petition the Tax Court within 90 days after that, then your property is forfeited.

The COURT. May I ask a question?

Mr. LEWIN. Sure.

The COURT. This assessment was levied for the years 1970, 1971.

Mr. LEWIN. Yes. Yes, Your Honor.
8 The COURT. And 1972, is that right?
Mr. LEWIN. No, not 1972, Your Honor.

The COURT. Just two years?

Mr. LEWIN. Just two years.

The COURT. Did he file a return in 1971, and did he pay any tax?

Mr. LEWIN. He filed a return in 1971, and I am advised he paid a tax in 1971.

The COURT. How much?

Mr. LEWIN. I don't know the exact amount. Mr. Shapiro is going to get me a copy of his income tax return. I don't——

The COURT. I think your co-counsel is getting it for you.

Mr. LEWIN. No, I know we do not have a copy of the return yet. I have received a copy of Mr. Shapiro's 1972 return.

The COURT. Do you remember what the representation was by the government the other day?

No tax was——

Mr. LEWIN. No, I don't recall, Your Honor.

The COURT. Didn't Mr. Rankin tell me no tax return was filed, and no tax was paid?

Mr. FUERTH. Your Honor, for 1970 there was no return filed.

9 For 1971 there was a return filed. If Your Honor will give me just a moment, I have it right here in my briefcase.

There is a small amount of income shown. I can't recall at this point whether there was any tax paid.

The COURT. All right.

Mr. LEWIN. I think there was a small amount of income. I believe there was a tax. I am not sure. But there was a return filed for 1971. The taxpayer was here for only part of 1970.

I understand he did not engage in any activities during that year which would require him to file any return, at least according to what he has explained to me. He came at some point in the middle of 1970.

The COURT. How did he come into the country, legally or illegally?

Mr. LEWIN. He came into the United States—Your Honor, I candidly do not know the details of how he came into the United States.

Let me say one thing. The government has made a representation in its papers that he was here illegally, and that the Immigration Service arrested him.

The Immigration Service did arrest him and charge him with being an overstay. He is here as an alien. When his

Immigration Service attorney spoke to the Immigration
10 Service officials, they told him that they arrested him at the request of the Israeli Government, which was going to be filing an extradition request.

In other words, I don't think—and there was never—and there was never, although he was arrested in June of 1972, Your Honor, between June of 1972 and December 2, 1972, the Immigration Service did not proceed with its proceeding. It kept continuing it and continuing it, saying that they understood the Israeli Government was going to be asking for extradition, and there was no purpose in proceeding with any Immigration Service proceeding.

There was no legitimate—I submit that that demonstrates that there was really no legitimate Immigration Service interest, as such. They were acting on behalf of the Israeli Government, which had informally said to them: Well, if you arrest him, then, you know, he will be here, and we will have an extradition application.

And there are various other—I might say the government, Mr. Rankin, who admitted that he had a very brief acquaintance with the case, and the facts of the case, gave Your Honor a recitation last week which I did not dispute in detail because I did not think it served any purpose at that time.

But I think there also appear in the motion to dismiss various assertions regarding Mr. Shapiro, and the
11 charges made against him, which we would strenuously contest, Your Honor.

And there is no question about this:

That there is an outstanding indictment against him on a charge that arose out of his conducting an investment company in Israel.

That charge, I might say, was one which, if the government wants to go into the facts—and we did not want to go into the underlying facts of the extradiction in this court; we did not think it was appropriate, but——

The COURT. It has already been litigated.

Mr. LEWIN. Yes, it has already been litigated.

The COURT. So it is res judicata.

Mr. LEWIN. But just simply to clarify that point, the charges that were made against him in Israel were only made a long time after the matter was aired, and, we submit, because of political pressure in Israel.

Now, I should point out again in that regard to Your Honor—and it relates to the basic claim that we have made—that in the first diplomatic note sent by the Department of State to the Israeli Government—and it appears as an attachment, I think, of Government's Exhibit 1, with the papers that they filed with Your Honor—the concluding paragraph of that note specifically states, with regard to the reasons for Mr. Shapiro wanting the conditions from the Israeli Govern-
12 ment, that Mr. Shapiro's express motives are:

One, his desire to be in the United States for the birth of his child; and,

Two, his fear that he will be imprisoned prior to his conviction or acquittal in order to satisfy the desires of his politically motivated accusers.

Now, that has been the claim from the outset, that Mr. Shapiro has said; and, as I said, from the first day I represented him—and I spoke to the United States Attorney in New York—I said, "This man is ready to go back if he can be released on bail in Israel and can stand trial."

There was no interest expressed at that time by the Assistant United States Attorney, and none, until the matter reached the Department of State in the middle of December.

Now, in that regard——

The COURT. All right. I am sorry I got you on a detour.

Mr. LEWIN. It is an excursion, but I think in some ways maybe it is relevant to the flavor of the case, Your Honor, because I think there may be some suggestion by the government—and they talk about soiled hands or something—that this is a vicious malefactor who in some way has to be returned to Israel.

That is just, I think, plainly and unequivocally un-
13 true, which is demonstrated in part by the fact that the Israeli Government, you know, was willing to make the accommodations it did and by the fact that even on the initial appearance before the judge in the Southern District of New York he was released on bail.

There has been no suggestion that he is fleeing any place, or going off anywhere. Those suggestions are simply untrue.

There is also a comment some place that he fled Israel. The fact of the matter is that under Israeli law a charge has to be filed against an individual from the time preliminary pro-

ceedings are brought within 180 days of the time that the arrest is made.

After that any bail lapses, and, in fact, the bail in this case did lapse. There was more than 180 days between the institution of the charge and subsequent proceedings.

These is no claim made by Israel that they are entitled to any bail money or anything, or that he jumped bail in any way.

But let me get back to the details of this case. As I say, our broadest contention—and it is one that the court need not reach on the facts of this case, but which I think squarely presents the legal issue—is that the Government of the
14 United States cannot do both things at one time.

They can't say: We forfeit your money, and we send you out of the country under an extradition warrant.

It can choose one or the other, and it can say: You will be extradited. If it says: You will be extradited, then it waits until the individual returns and has a tax proceeding in which he can litigate the validity of that tax, Your Honor.

That opportunity simply was not given to Mr. Shapiro. And we think on that basis—and Mr. Fuerth has admitted to Your Honor that he knows of no other case in which a jeopardy assessment has been levied, together with an extradition.

We submit we know of none.

Because I was representing Mr. Shapiro in this extradition matter, I did exhaustive research into extradition, and I have never found a case where the Government of the United States acted so arbitrarily and so outrageously with a man whom they were extraditing and said on the eve of his extradition: Now, we are going to take all of your money.

We submit that Your Honor can, and should, simply under standards that the courts have applied under due process standards rule that a jeopardy assessment under these circumstances is a taking of property without due process.

Now, we have also cited in our memorandum a case
15 which I think counters completely the government's argument that there is no authority to remove a jeopardy assessment. That is the *Lambe* case decided by a district judge in California where there was—the case is unreported, but we submitted with our memorandum a copy of the judge's opinion in that case.

But there was in that case an agreement as part of the plea bargain in which the United States Department of Justice had

engaged by which the defendants were given certain assurances regarding what the future had in store with regard to any kinds of punishments or exactions.

Thereafter, the Internal Revenue Service, claiming as it does in this case, that it is a separate arm of the government and was not a party to the agreement, went out and levied jeopardy assessments.

The district judge issued an order, and the order appears in full as an appendix to our memorandum, on August 15th of this year in which he directed the Internal Revenue Service to enjoin them from assessing, or attempting to assess, any tax. He essentially lifted the jeopardy assessments, Your Honor.

He did so on a finding that the Internal Revenue Service could not disclaim the promises made by other agencies of the government. The opinion appears as Exhibit 6 to our memorandum.

16 The COURT. It was filed in that court on August 15, 1973.

Mr. LEWIN. Yes, Your Honor.

And the court specifically found that the Internal Revenue Service could not disclaim what had been stated by the Department of Justice.

The court in Finding 14, which appears on page 5: "A denial of the relief would constitute a deprivation of property without due process of law and would be the taking of private property for public use without just compensation in derogation of the Fifth Amendment to the Constitution of the United States."

The COURT. Wait a minute. I do not have page 5, sir.

Mr. LEWIN. I am sorry. Not of the order, Your Honor.

The COURT. I have page 4 of the order.

Mr. LEWIN. But the immediately preceding document is the opinion, Your Honor. I am sorry. Exhibit 7 is the order. Immediately preceding that is the opinion, the findings of fact and conclusions of law.

The COURT. All right.

Mr. LEWIN. At page 5 of that opinion, as I said, the judge said that it would be unconstitutional for the jeopardy assessment to stand.

17 He said in Finding 16:

"By reason of the special or extraordinary facts and circumstances of this case, the anti-injunction act of the Inter-

nal Revenue Code does not prevent the equitable relief prayed for by the defendants."

Now, we submit that the constitutional argument applies as fully to this case, and, indeed, more so to this case, than it did to the Lambe case.

Because in the Lambe case the parties were in the United States. They had every opportunity to raise the issue that this had been part of the plea bargain in a proceeding that they filed, and a petition that they filed with the Court, for that matter, exactly what Mr. Fuerth is urging Mr. Shapiro.

They could file a petition with the Tax Court. This assessment is improper. The jeopardy assessment is because we have been given certain assurances.

Mr. Shapiro does not have that option. Mr. Shapiro will be out of the United States. He will be unable to consult with counsel. In terms of the facts regarding the tax claim made against him, there is no opportunity for me even to discuss them with him prior to the time of filing a petition in the Tax Court.

As I say, that is our broadest argument:

That in no event—and I submit there is no precedent
18 for the government ever having done it—in no event may extradition be combined with a jeopardy assessment.

Let me turn briefly to why it is not necessary for Your Honor to reach that broad ground, and that is because in this case there are two factual circumstances.

One is the delay of time which emerges, I think, inferentially from the record; and, even more so, from the answers to the interrogatories, sketchy as they are, objected to as they were, by the government, that the government has served upon us today.

An the second relates to the bargain between the plaintiff and the government.

With regard to the lapse of time, it appeared strange to me, when it happened, that on the day before, one working day, as I say, before Mr. Shapiro was scheduled to leave, the jeopardy assessment was filed without any prior request to him, any prior contact that would amount to questioning whether his taxes were proper.

If this is simply a matter of the United States seeking to obtain a tax obligation, or recover on a tax obligation which a tax-

payer has, I would have thought that they would have been able to contact him earlier.

So we inquired in an interrogatory, which Your Honor directed that the defendants answers, and one of the few interrogatories they answered indicated—the question
19 was whether—when the inquiry—what date, we asked, did investigation or inquiry begin?

The answer was the investigation was first assigned to a special agent on September 17, 1973.

Now, the first thing, of course, that registers in my mind—and I am not a tax expert—is that I know that special agents are not ordinarily civil audit agents of the Internal Revenue Service.

An investigation does not begin with a special agent. I have never heard of it beginning with a special agent.

The COURT. You are not correct.

Mr. LEWIN. All right.

The COURT. You are not correct. I remember from my days in private practice that you should inquire, when somebody coms around from IRS in regard to a given client as to whether the agent is a special agent or a revenue agent. If he is a revenue agent, it is a civil matter. If it is the other, it is a criminal proceeding, a criminal investigation, sir.

You do not have to be a tax lawyer to know that.

Mr. LEWIN. Right, Your Honor.

The COURT. So that was the tip-off on September 23rd as to what the government was up to.

Mr. LEWIN. All right. But if they were looking——
20 The COURT. Isn't that right?

Mr. FUERTH. That is correct, Your Honor. A special agent is charged with the enforcement of the criminal law.

The COURT. All right.

Mr. LEWIN. Now, if they assigned this matter to a special agent on September 17th, I asked the special agent, whom I met on Monday of last week when I went up to New York and met with three revenue agents at that time, I asked him, you know, "Special agents are criminal investigators. Are you here for criminal tax purposes?"

He said, "No. I just began—at some earlier point I was involved in the investigation, so I am here because I was involved with the investigation earlier."

But, in any event, I submit that the government has not answered when the Internal Revenue Service began any kind of inquiry.

They have indicated when it was referred to a special agent, which, to me at least, indicates that they began looking into the civil aspects at some earlier date.

But even accepting September 17th, the next interesting thing is that the government says that it learned——

The COURT, Well, I have read the answers they gave, so you do not have to go over that, and your time has expired.

Mr. LEWIN. Right, Your Honor. Let me just point up a few things in that regard, if I might, just because I know I did touch on some other points that Your Honor inquired about. I do not want to go over my time, but I would just like to direct it.

The special agent, according to the answers to the interrogatories, the special agent learned about the extradition by interviewing the Immigration Service and then by interviewing a consul of Israel, who advised the special agent on November 28, 1973, that Mr. Shapiro was due to depart the United States on December 9th.

Now, again, those strike me as being remarkable avenues for the Internal Revenue Service to inquire from, before they even check with the taxpayer and ask for the taxpayer's books and records.

Although I did not make any allegation at last week's hearing that this was done, the jeopardy assessment was in any way done, by, or on behalf of, the Israeli Government, to see that this man cannot raise bail, I begin to wonder when I see that there were discussions by the special agent with a consul of the State of Israel on November 28, 1973, regarding this matter.

And, thereafter, on December 6th, the jeopardy assessments were levied.

I begin to wonder whether it wasn't pursuant to that discussion that it was agreed upon that the assets that Mr. Shapiro had in the United States were in some way going to be forfeited or seized so that he would not be able to make bail when he gets to Israel.

Now, as I say, that is just one of the aspects that comes out of the answers to the interrogatories:

That rather than being a bona fide tax investigation, the IRS, it looks to me, is in some way, after discussions with the Israeli Government and after discussions with the Immigration Service, trying to freeze this man's assets.

But that is why—that is just one of many factors which I think narrow this case. The court need not decide that every jeopardy assessment, in combination with an extradition, is unconstitutional.

But, certainly, where there is no request made, or no information given to the taxpayer during a period that, I submit, is, by their own interrogatories, a month and a half prior to the extradition—and I submit really longer if one goes back to determine whether there was someone in the Audit or Intelligence Division who was handling the case before the special agent—if there is no inquiry made by the Internal Revenue Service over this extended period of time, let me say an extended period of time, when, as we say in our verified complaint, there was no fear, there could be no fear on the part of the Internal Revenue Service, that these funds would disappear, because the funds which they have levied upon were all subject to bond for his appearance at the Immigration Service and at the district court.

So there could be no argument by the Internal Revenue Service that if they asked Mr. Shapiro about his tax liability in October, or in November of 1973, the money would disappear. Because the money was irrevocably here until such time as he would leave the United States.

So they had every opportunity to talk to him and engage in a bona fide inquiry and ask him to produce books and records to explain anything that they might have.

In addition to that, the Internal Revenue Service does not, to this date, even want to specify what the liability would be, or even remotely suggest on what basis they are claiming any liability.

Third of all, all of this occurs against the background of an agreement, and, here, again, the document that is present to Your Honor, I think, is very important, Government's Exhibit 1, attached to its paper, that first note to the State of Israel from the Department of State.

It concludes with the Department of State saying to the State of Israel that Mr. Shapiro's request for these terms is

based upon his fear that he will be imprisoned prior to his conviction or acquittal.

24 Now, that was raised at the very outset. That is exactly what we told the State Department. That is exactly what the State Department told the Israeli Government:

That the purpose of this agreement is so that he will not be imprisoned prior to conviction or acquittal.

In response to our papers, the Department of State has even put in a letter which I sent to the State Department in November, at the end of November of this year, stating in writing that we wanted the Immigration Service proceeding terminated so that the money in that Immigration Service proceeding could be used for his release on bail.

So they knew well before December 6th that that money would be needed to release this man on bail in Israel.

So the facts of this particular case make it far more outrageous and far more in the way of over-reaching on the part of the Government of the United States than simply a case of any jeopardy assessment attached to an extradition.

What it says essentially is that the United States not merely can forfeit a man's property before it extradites him, but can do so even though they wait until the eve of the extradition in order to seize his property. So that he has no recourse except possibly the extraordinary recourse of having obtained—of obtaining an injunction from a court.

That he has no recourse that they can wait until then; that they can do so notwithstanding the fact that they

25 refuse to make any kind of a showing at all to a court, or to the taxpayer, of what their claim is based on.

And I am ignorant to this day, other than their saying that there is an understatement.

And that they can do so in the face of the express purpose of an understanding by an exchange of notes between the United States and Israel, and an exchange of correspondence between the Department of State and the plaintiffs' attorney, that the purpose of all of this was to allow him to be released on bail in Israel.

Now, we submit that there is ample authority. The Lambe case in the district court, we think, is clear authority for this court's action to enjoin the jeopardy assessment.

We think the government argues—and I have briefly read over their paper, but the government argues—that there is no authority to enjoin an extradition.

Well, if they are talking about authority, I think plainly there is, if the extradition were unconstitutional. If tomorrow suddenly the Secretary of State, without any procedures, were to sign an extradition warrant for my associate there and propose to ship him out to Argentina, I am quite sure I could go into a district court right here and enjoin that extradition as being contrary to law and unconstitutional.

26 The notion that no court can interfere with an extradition is just plainly wrong.

Now, the notion that you can't look behind the merits of the extradition proceeding, that it is not Your Honor's job to look behind the merits of that, is plainly right.

And that is why we have in no way in this case suggested or argued or in any way attempted to have Your Honor review any part of that decision. We recognize that that is a clear limitation, and the extradition is as given.

The question is only whether today the United States may say to this man, on the basis of all of these facts, and on the basis of the hardship to his wife—his wife is here in court, Your Honor; and, although it was hard for her, I brought her down because I thought it might be useful to present her testimony on the record as to what the hardship would be to her, if her husband were to be forced to leave under these circumstances.

But the hardship to an extradited individual in these circumstances and to his wife, who is a plaintiff, I think, is such that simple justice—I mean the simple due process provisions of the Constitution of the United States, and the Fifth Amendment, require that a court step in and say to the United States: You can have one, or you can have the other, but you just can't have both at once.

27 Thank you.

The COURT. All right, Mr. Rankin.

Mr. RANKIN. At the outset, Your Honor, if I may respond to a few questions that came up during counsel's argument, one relating to the tax return of 1971, our tax return shows that there was a small amount of income.

It appears to me that there is just a gross income of $1600. It appears to be a total income of $1600, on which no tax was paid.

The COURT. All right.

Mr. RANKIN. Again, at the outset, Your Honor, I would like to discuss briefly several points that were raised by plaintiffs' counsel.

Throughout the course of his argument, he asserted that these levies pursuant to a jeopardy tax assessment are, in fact, a forfeiture.

Consistently, he argued that this was a forfeiture of this plaintiff's funds.

This is simply incorrect, Your Honor. Plaintiff has the opportunity to contest. If the plaintiff wins, he then is entitled to the funds, subject to whatever other liens there may be. But our lien would be off.

It is, in effect, a lien, and it is not a forfeiture, Your Honor.

> Every person who is subject to a jeopardy assessment
> 28 where property is levied on prior to tax litigation is subject to having his property seized or withheld from his use.

Plaintiff is in no different position than any other person under these procedures, and if he succeeds in his tax litigation, the government has no interest at all in that property.

The COURT. Would you not say that it is possible you could distinguish this case from the others by virtue of the rather unusual agreement negotiated on behalf of the plaintiff by and through the State Department with the Israeli Government?

Mr. RANKIN. If Your Honor is suggesting that this agreement was by the State Department, rather than simply possibly through the State Department——

The COURT. I said "through".

Mr. RANKIN. I thought the court said "by and through".

The COURT. That is correct.

Mr. RANKIN. I would like to get to that point, Your Honor, because I think——

The COURT. Well, I do not want to derail you or send you on an excursion that is not relevant to the issues, Mr. Rankin.

But it does appear to the court that the facts of this
> case may make the situation that we are dealing with
> 29 sufficiently unique so that you do, in the final analysis, have only one of the two options suggested by the plaintiff.

On the other hand, I, obviously, am concerned by the very serious allegations which you have already alluded to in prior proceedings:

(a) About the possible lack of this court's jurisdiction; and,

(b) If I were to enjoin the government from proceeding with the extradition, I would be interfering with the jurisdiction of a sister court, possibly doing violence to the principle of comity.

I hope everybody would grant that I certainly do not want to do an injustice to either of the parties, but I do not want to act contrary to the court's jurisdiction, either.

I think those matters are very serious, the jurisdictional question, and I think that is the threshold issue that the court must decide.

Maybe I can phrase it this way, Mr. Rankin, as a threshold matter:

The extradition order entered by Judge Pollack in the Southern District of New York is not contested here. It is not subject to collateral attack in this court. Plaintiffs' counsel conceded as much, specifically.

Yet, at the same time, they ask this court to exercise its
> equitable jurisdiction, which they urge is not subject
> 30 to the anti-injunction statute because of the peculiar facts of this case; and that if the court were not to enjoin the execution of these levies, or to set aside this jeopardy assessment, it would be tantamount to a denial of the plaintiffs' right to procedural due processs.

Whether it would be tantamount to a forfeiture or a penalty is another matter, and it might be stated that way, too.

But you have heard their arguments.

Now, I think that what would be most helpful to the court would be for you to address yourself to the jurisdictional aspects of the matter, because that may save me a lot of time, Mr. Rankin.

Mr. RANKIN. Very well, Your Honor.

The COURT. I do not want to be presumptuous. You tell me whatever you had planned to tell me, and need to tell me.

Mr. RANKIN. After hearing plaintiffs' argument today and the characterization by the plaintiffs of the facts of this case, as we see it, I think it is essential to our case, and to this court's understanding of the case, to briefly discuss three or four factual points to put the jurisdictional arguments in a proper context.

572-247 O - 75 - 8

The COURT. All right.

Mr. FUERTH. First of all—well, before that, I would like to say it seems to me that plaintiffs' concern here is, and
31 has been for some time, simply to keep this man out of jail.

This is clarified somewhat in their preliminary injunction papers. This is the purpose, and plaintiffs have sought, administratively and judicially, to achieve this freedom, and they have been very successful in doing so.

Now, we submit, Your Honor, that there is no power of this court, or of the Government of the United States—and I am speaking of the Executive Branch—to guarantee plaintiff's freedom when he returns to Israel.

As an alternative, it would appear that plaintiff says, "Well, in any event, if I am extradited, I would like to have those moneys available to use in possibly achieving bail."

But, Your Honor, this would require the setting aside of these tax levies to enable him to have that money, and, as we will show later in this argument by legal precedent, the relief must be denied.

We submit he has not made sufficient allegations under Enochs and it flies in the face of the precedent that claims of denial of due process must be made in the context of tax litigation, which has not started yet, and it is premature, Your Honor.

Now, if I may go to these factual matters, one involving this agreement that we have heard so much about, and I think it is essential that we understand what this agreement
32 was.

As this court is well aware, plaintiff had exhausted remedies all the way up to the Supreme Court, where the Supreme Court en banc denied a stay of his extradition.

So, for all intents and purposes, that was the end of the matter, except plaintiff filed a writ for certiorari. But, in any event, there was nothing to stop extradition.

Thereafter, plaintiff proposed than he would voluntarily surrender and dismiss his petition for certiorari if Israel would make certain assurances to him, and not if the Department of State would.

The Department of State forwarded this to Israel. Israel came back with a diplomatic note on September 4th, Your Honor.

The COURT. Agreeing to the three conditions, is that right?

Mr. RANKIN. Just a moment, Your Honor.

Your Honor, the second point is, as to the release on bail: Israel stated, "The state will raise no objection to Mr. Shapiro's release on bail. It should be, however, noted that the court, alone, is vested with the final discretion in this matter."

Now, that is very clear, and plaintiffs' counsel is very familiar with that, and this court is. It is not up to the
33 Ministry of Justice in Israel to say whether or not the man eventually will be released.

They said the most that they could say, and, that is, that they would not oppose it. That was the agreement, Your Honor.

It is no guarantee of release over there, which has been the characterization of this case by the plaintiff: that the government somehow has agreed or guaranteed that this man will be released when he is in Israel. That is simply not the agreement.

This September 4th agreement is in effect at the present time.

Although there was one point where Israel reneged on it, the Department of State suggested that they reconsider it. They did, and reinstated it. So this is the agreement. There is no guarantee. It is simply that.

Secondly, plaintiff tries to state that his withdrawal of the petition for certiorari in some way denies him due process Your Honor.

Now, plaintiff dismissed that petition for certiorari based on these assurances that he had received from Israel, not from the Department of State.

He claims that Israel later reneged. That is true. The State Department immediately called plaintiffs' counsel and advised him of this and said, "Don't submit a stipulation from
34 the Solicitor General if you receive it."

Nevertheless, plaintiff went ahead and submitted that signed stipulation.

The agreement was later reinstated so that really that is irrelevant to the case, but that was a big point in plaintiffs' papers.

The third point, Your Honor, is that plaintiff has consistently argued that encompassed in an agreement somewhere was an assurance that included a guarantee that he would be entitled to use moneys in Israel for bail over there.

This is simply not supported by the record, Your Honor.

Israel told the plaintiff, at his inquiry, that bail would be recommended, it is my understanding, or would be set at $50,000.

Now, obviously, the Ministry of Justice cannot control the court, or what the court might set, when he is over there. The Ministry of Justice, or the Department of Justice, can recommend what bail should be.

The COURT. What you are saying is that judges in Israel probably are like judges in the United States. They do not always agree with the government.

Mr. RANKIN. Yes, Your Honor.

The COURT. Is that right?

Mr. RANKIN. I think that is what I am trying to say.

35 The COURT. All right.

Mr. RANKIN. However, after the assurances, Your Honor, and after the withdrawal of the petition for certiorari, and after a determination, and agreement, by the parties on the date that Mr. Shapiro would surrender himself, on November 27th, plaintiffs' counsel wrote a State Department representative, and this was a very crucial letter concerning bail moneys.

This was the first time that this issue was raised, long after any agreement, and now plaintiff says that this was part of an agreement, that the government is breaching because he is guaranteed to have moneys when he goes back. This simply is not the fact, Your Honor.

On November 27th, after the date had been set for the December 9th surrender, plaintiffs' counsel says, sort of as an afterthought, that, "I have been reminded by Mr. Shapiro's lawyer in New York, his Immigration lawyer in New York, that we still have an outstanding matter resolving the bond on the Immigration proceeding."

That is the first time that plaintiffs' counsel brought this up, to my knowledge, from thoroughly reading the records in this case.

So I suggest to you there was absolutely no agreement with regard to bail money.

There is one final point I would like to make on these facts, and that is concerning an alleged conspiracy or bad

36 faith or collusion on the part of IRS and the Department of State.

The allegations are that IRS must have known about this for a long time. Your Honor, we have filed a sworn affidavit today, which has not been opposed at all by any sworn affidavits on the part of the plaintiff, and which cannot be refuted. The special agent is in the Court House, and he will tell this court that he did not know, or did not institute an investigation, until after he was assigned the investigation on September 27th, or September 17th, I believe; and the actual investigation commenced on September 24th.

He also stated that he had absolutely no information of the extradition proceedings until October 31st, and that at that time a lawyer from the Immigration Service advised him of them, but said that these matters were on appeal.

That is October 31st.

Later, on November 28th or 29th, I believe, he first learned that a date had been set for this man's extradition. So we are talking about seven or eight days from the time IRS learned of the date this man was leaving the country. We are talking about less than that. We are talking about six or seven days, until the time the jeopardy assessment was entered.

Now, it is inconceivable to me, Your Honor, that this

37 can be considered an unreasonable length of time in which to act in a situation, which IRS faces in many situations, when they are about to lose someone, or assets, that they deem that they have a claim to.

Congress has provided for this procedure, and it has consistently been followed by IRS. This is exactly what happened in this case.

Yet, plaintiffs try to take that and take it back to the entire discussions concerning the extradition and draw them up into one big ball and say there is deprivation of due process here.

There is absolutely no agreement that this man is going to have bail money over there.

There is nowhere in the record an agreement, a written agreement, an oral agreement, a stipulation, that he would be entitled to that money.

We submit, Your Honor, that the IRS did exactly what Congress said it should do in levying a tax assessment. Clearly, if this man had been extradited or had voluntarily surrendered and the money in some way followed him, the United States in a later tax proceeding, even if it prevails, does not have assets to cover the tax deficiencies.

This is the purpose that Congress had in passing this litigation, and we submit, Your Honor, it was properly followed in this case.

38 There is no scintilla of bad faith or collusion on the part of the government.

I might add, when the plaintiff makes such allegations, Your Honor, the federal rules require that they be made with particularity, and we have no particular allegations on those points.

Now, in the context of that, the court has already indicated—and I am sure it has—that it has read these papers with regard to the extradition.

We submit, Your Honor, simply that the court lacks the jurisdiction to enjoin an extradition.

The agreement was worked out with the Government of Israel. It has been in effect since September 4th, and there were no guarantees on the part of the Department of State.

Matters of extradition under treaties with foreign countries are non-justiciable.

The President and the Executive Branch of the government have full authority over such matters, and we submit, Your Honor, that the court simply has no jurisdiction over this matter.

Moreover, there is no authority, Your Honor, that we know of, for the court to delay an extradition that is final; that the warrant has been signed; and that——

The COURT. I think you made a misstatement, Mr. Rankin.

39 Mr. RANKIN. Maybe I did.

The COURT. You said matters of extradition under treaties——

Mr. RANKIN. Under treaties are non-justiciable.

The COURT [continuing]. Are non-justiciable.

Mr. RANKIN. That is correct.

The COURT. Well, if that were so, how did Judge Pollack order the plaintiff extradited?

Mr. RANKIN. Your Honor, that is a statutory proceeding that has to be followed under the statute.

The COURT. Pursuant to the treaty.

Mr. RANKIN. I mean pursuant to the treaty.

The COURT. So it was under a treaty and under a statute.

Mr. RANKIN. He has to be found extraditable, Your Honor.

The COURT. Correct.

Mr. RANKIN. Before any final action is taken by the Secretary of State to have him extradited.

The COURT. Well, I have no quarrel with you about that.

Mr. RANKIN. But that is not relevant here, because that has been challenged all the way up, and that is settled, Your Honor.

The COURT. I understand that, but I think that state-

40 ment is erroneous.

Mr. RANKIN. Very well, Your Honor. But we submit that, once the courts have finally reviewed the extraditable nature of an individual, and once the Secretary of State has signed that warrant and has given it into the hands of the foreign country, that, for all intents and purposes, the extradition is over, and this court lacks any power to delay or enjoin such extradition.

Since, as we submit, the court cannot interfere with the surrender to Israel, plaintiff, it appears, would then have this court set aside the notices of levy.

As we have said before this would obviously take away the right that the United States has to these tax funds, if, in fact, later they are adjudged to be correct. And this court is very familiar with the Enochs case.

The COURT. I hope so.

Mr. RANKIN. More so than I am, Your Honor, I have to admit.

We submit, and have thoroughly briefed in our papers, that, clearly, this does not come within the two exceptions to Enochs, the two statutory exceptions, nor does it come within the judicially created exception.

And, basically, we say that for this reason, Your Honor:

We submit that the plaintiff has a burden not of

41 making an argument, but, rather, with well-plead facts in its complaint, showing that the government cannot be wrong—or the government is wrong in what they are saying.

In other words, they are to come in and say, "I work here. I made so much money. I paid this much tax. Here is a copy of my tax return."

These are the matters, we submit, that have to be pleaded by a plaintiff in order to get injunctive relief.

Now, we talk about tax returns. It is my understanding that plaintiffs' counsel called up to New York after he learned of these tax assessments and sought to discuss these matters with the people in New York, the tax people.

They said, "Yes, we will discuss it with you. Bring whatever papers you might have."

When they arrived up there, I understand they had no papers with them.

So it is not that they did not have some opportunity to present something to the government that might have changed the government's mind.

But neither there, nor in their complaint, have they alleged facts which, we submit, bring them within Enochs.

Your Honor, Enochs goes further. It requires also that all other requirements for equity relief be met, and this is where we get to the clean hands argument, and we have briefed that in our papers.

42 We submit that plaintiff simply is not entitled to equity relief in this court.

The last argument which we have briefed concerns what we think, or what we have tried to understand is, plaintiffs' due process argument.

It seems, Your Honor, that they say that Mr. Shapiro had some right to these funds, and that by the denial of these funds, he will be unable properly to litigate a later tax case.

We simply say, Your Honor, that there are a lot of "if's" involved in this. There is a question if he will ever be released on bail in Israel. There is a question as to whether he will not be able to contact his counsel in the later conduct of tax proceedings.

We submit, Your Honor, there are so many "if's" that this simply is premature for this court to entertain some due process argument in that context.

The case law clearly shows that a person outside of the jurisdiction of this country can contest a lawsuit, and it is not unconstitutional.

We submit, Your Honor, that plaintiff, if he is unable to so conduct his lawsuit, can raise that issue in the proper forum, and that would be during the conduct of that litigation, whether it be in the Court of Claims or whether it be in the Southern District of New York.

43 But, Your Honor, we would submit that that is the forum where a due process argument should be raised that he is unable properly to defend himself at the Tax Court.

This court cannot determine whether or not this man is going to be deprived of any due process. If this court allows this man to take this money with him, there is no guarantee he is going to be released on bail at all. There is no guarantee that the bail is going to be $50,000 to $100,000, because the court has the ultimate authority.

But there is one guarantee:

Once this court lets the money go, even if the United States should later prevail in the tax case, they will not have the assets to cover that deficiency.

The COURT. The Supreme Court of the United States in *Enochs* v. *Williams Packing & Navigation Company*, the case that we have talked about, says:

"The question of whether the goverment has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of suit. Only if it is then apparent that under the most liberal view of the facts and the law the United States cannot establish its claim may the suit for an injunction be maintained. Otherwise, the District Court is without jurisdiction, and complaint must be dismissed."

44 Mr. RANKIN. That is correct.

And the court knows that the Internal Revenue Service has conducted an investigation, has come in with a tax deficiency, and has issued levies on this property.

Plaintiff has not come in and stated anything, in affidavit form or under oath, with regard to the amount of income he had, with regard to where it came from, with regard to how it was spent, with regard to how much tax was paid.

We submit, Your Honor, these would be well-pleaded facts that then put the burden on the government; and the government, if it has to, can come in and tell that plaintiff what it might have to.

But this is not a proper forum for litigating a tax case, and the government does not have to open up its investigation file to show to this court. That comes when the case is litigated in the Tax Court.

So we submit, Your Honor, that there is a burden on the plaintiff, in order to get this court to take jurisdiction even to look at this matter, which he has not addressed himself to.

The COURT. You would agree, would you not, if they make a proper showing, that the anti-injunction section of the statute is not an impediment to the relief they seek, provided, of course, the facts warrant it, and, secondly, if they come within the view or the standard, rather, of the
45 Enochs case.

Mr. RANKIN. I don't quite understand you. There are many standards in the Enochs case. Well, there are at least two.

The COURT. Well, Section 7421 of the Internal Revenue Code, I am sure you would agree, does not bar this suit, standing alone, if the plaintiff can make a proper showing.

Mr. RANKIN. That is correct. It does not bar the suit. That is correct, Your Honor.

The COURT. All right.

Mr. RANKIN. The only other point is: Even if maybe plaintiff has made a proper allegation, then you get to the question of whether he has met the other burdens for equitable relief.

But we submit on both counts he has failed, Your Honor.

The COURT. All right. Mr. Lewin I know you have a lot at stake, and I want to be most courteous to you. I think I understand your position, as eloquent as you are and as helpful as you have been.

The only thing that I perhaps could do would be to spend some more time trying to assimilate the papers that the government so carefully, but expeditiously, prepared for this court's consideration, and as you did, also.
46 I have just had an opportunity to skim them today.

I think I understand the arguments and the contentions of the parties.

I do not know what more I can learn from any further allocution or eloquence on your part, or the other side.

Mr. LEWIN. I appreciate that, Your Honor.

In the time that I unduly took in my opening argument, I did not address myself that directly to the jurisdictional and forum non conveniens point, which I think Your Honor raised with Mr. Rankin.

I wonder whether I might just speak to that. I appreciate that the hour is late, Your Honor.

The COURT. All right. I will give you five minutes, sir.

Mr. LEWIN. All right.

Let me say on the forum non conveniens point, interestingly enough, the government has filed no motion for a transfer to the Southern District of New York.

There is nothing, there is no reason, why this case can be better litigated up in the Southern District of New York on the legal and constitutional issues that we have presented than it can here.

Nobody is attacking Judge Pollack's order.

There are, according to the government, no particular witnesses that are being produced, or that have to be pro-
47 duced.

Consequently, I just don't see why this case has to be litigated in the Southern District of New York.

The COURT. They are willing to produce the Internal Revenue agent.

Mr. LEWIN. They said the Internal Revenue agent is in the building.

The COURT. That is right. And they presented an affidavit which is uncontroverted in the record.

Mr. LEWIN. Well, Your Honor, I am not sure. Was there an affidavit from the Internal Revenue agent? I have not seen that, if there were.

Mr. RANKIN. I believe there are answers to the interrogatories, Your Honor.

The COURT. You described it in your argument as an affidavit, I believe.

Mr. RANKIN. I think I said sworn—I am sorry, if I did, Your Honor. There are sworn answers to interrogatories.

Mr. LEWIN. Sworn to by Mr. Fuerth, and not by the Internal Revenue agent.

The COURT. That is correct. I am sorry about the error.

Mr. LEWIN. Your Honor, there is no reason, since the government does not have to transfer. It does not come under the language of the statute. We have a portion of our
48 brief that I would refer Your Honor to in that regard, because I think it is quite clear.

The COURT. I have already independently looked up the question of venue.

Mr. LEWIN. All right.

The COURT. I am not going to say that I have decided it, but I have looked it up and considered it.

Mr. LEWIN. All right, Your Honor. So in the brief time I have I am not going to elaborate on that point.

On the jurisdictional point, Enochs quite clearly reaffirms Nut Margarine, which said that in special and extraordinary facts and circumstances there is jurisdiction in the court.

The COURT. And you say this is a special and extraordinary case, based upon the peculiar and unusual facts, and, therefore, the court does have jurisdiction, and, therefore, the court should use its equitable powers to enjoin—to remove the levy, I suppose you want me really to do.

Mr. LEWIN. Yes, to remove the levy.

The COURT. All right.

Mr. LEWIN. But my point in that regard is that the government says, "Well, you should come in and plead specific facts."

This plaintiff has submitted tax returns. He has sworn that they are true.

49 He is suddenly told by the Internal Revenue Service, "You owe $90,000 in taxes," without the slightest word as to what this may be based on.

I was not—and I have to stand up here and take the court's time—I was not told, when I called the Internal Revenue Service, "Bring whatever papers you have." That is just downright untrue.

I said, "I want to come up there and find out what this is about."

And they said, "Fine, come on up."

And I came up, and I found out nothing as to what this was about, not a word.

Now, the plaintiff is ready to present his books and records. He is ready to present them. He is ready to plead them.

The truth of the matter is I don't know what to plead. I don't know what the claim is, Your Honor. I don't know on what basis the Internal Revenue Service has suddenly decided that this man owes $92,000 in taxes.

There isn't the faintest whisper of a suggestion of anything that I am supposed to plead to.

If what Mr. Rankin is saying is that he wants a complaint that says, "Appended are all my books and records, and I owe no taxes," sure, we will do that. We would like leave to amend the complaint, if that is what he is saying.

50 But I think that is, you know, totally unfair. If we have no idea, then there is nothing to rebut. The Tax Court does not proceed that way. The government must make a specific assessment of an amount that is due and state on what basis it believes it is due. Then you have an opportunity to rebut.

But never in the few years that I have been practicing have I ever heard of rebutting a non-allegation, and that is what this is. It is a figure. It is not an allegation. It is a number. Rebut $92,000 in taxes.

Now, you go and rebut that.

The government has put an absolutely impossible burden. That can't be what Enochs means. It just can't be. It must mean that if there is some showing, if there is some audit, if there is some inquiry, and some statement about what this is based on, then the taxpayer must come in and plead why it is that he does not owe the money.

Now, just on one other factual point that Mr. Rankin, I think, has represented, and erroneously, I submit, represented, Your Honor.

He said there was no statement as to whether Mr. Shapiro would be released on bail.

I checked with the former president of the Bar Association of Israel, who was in the United States, then told him that never—and he has a criminal practice—has a judge in

51 the State of Israel insisted on bail beyond what the prosecutor requested.

I think the Israeli authorities knew that, and I think it is for that reason, if Your Honor will look at Government's Exhibit 6, that the final note that the Israeli Government sent did not say that they would not object to his release on bail, but said specifically, "The Embassy of Israel wishes to add that in answer to the letter the Embassy has notified Mr. Lewin that the sum of bail on which Mr. Shapiro will be released has been fixed at 250,000 pounds in cash or by bank guarantee."

It says the amount on which he will be released. They know the realities as well as we do. That was the amount on which he will be released, because if that is what the government asks for, the judge may set a lower bail, but not a higher bail.

That is consistent practice in Israel.

I checked on that, as I say, with the former president of the Bar Association of Israel.

Then Mr. Rankin has tried to make it appear as if the State Department gave up nothing.

I think, if Your Honor will read Government's Exhibit 1, the State Department in its note to Israel said that they were concerned that Mr. ——— indicated that I would suit challenging the internal proceedings of the Department
52 of State in extradition matters, which, I submit, are not consistent with the statute or with any due process standard.

They said, "The Department does not believe that Mr. Lewin presents a strong case. However, the Department would rather not be subjected to a lawsuit, if this can be avoided. All of this litigation," they said, "may delay Mr. Shapiro's extradition."

Therefore, they requested Israel to act on the letters I submitted to them.

And in the letter that Mr. Tallerico sent to me—and it is appended as an exhibit to the complaint—he very specifically says, and he speaks of the "arrangement worked out between you [that is me] and Israel, or that between you and the Department of State."

The attempt by Mr. Rankin today to say that the Department of State had no arrangement is contrary to the letter that the Department of State sent to me; it is contrary to the note that they sent to Israel, in which they very specifically said to Israel, "Look, there may be litigation testing whether this extradition is at all lawful, because our procedures are improper. We don't want that kind of litigation."

They also indicated that they were concerned about the petition for certiorari.

And notwithstanding what Mr. Rankin has said here, well, the man could have been extradited immediately, the
53 note that the United States Government sent to the State of Israel said that the petition for a writ of certiorari has been filed; the court will not act on it before October; the court may grant the writ; and that may result in an actual delay of another year in the actual extradition.

Those are all things we gave up in exchange for an understanding that this man would be released when he arrived in Israel, an understanding that the Israelis understood full well and the Department of State understood full well.

We submit that those are the extraordinary circumstances that justify the issuance of an order of the kind that we have requested, which would, alternatively, lift the jeopardy assessment, or say, if that is what the United States chooses, we will permit the man to stay here and contest it.

Because to me—and I come back to the hypothetical I gave Your Honor initially—the government certainly cannot put a man through a criminal trial at the same time it was extraditing him.

I don't see why they could put him to a forfeiture really, of saying—it is just unrealistic, of saying—"Well, go ahead and file your petition in the Tax Court in February, because you have a counsel here, and we have not told you what the charges are."

Now, I would like, in view of the government's papers, to be given the opportunity, if we think it necessary, to
54 file a very brief response tomorrow, and then I come back to the matter of the extension of the temporary restraining order, which, if Your Honor can read the papers, we think at least there ought to be an oral order from Your Honor extending the temporary restraining order until such time as you rule on the preliminary injunction.

The COURT. All right.

Yes, Mr. Rankin.

Mr. RANKIN. May I briefly respond to several points, Your Honor?

The COURT. Well, all right.

Mr. RANKIN. I will try to be brief, Your Honor.

As to the issue of transfer, it is our simple position that this court, and any district court, lacks jurisdiction over these matters.

Neither this court nor the Southern District of New York should invoke any jurisdiction. Therefore, the case should be dismissed.

If any court has jurisdiction, we submit under the Smith case it is the Southern District of New York that has it, and not this court. Therefore, a transfer might be appropriate to that jurisdiction.

Now, as to Mr. Lewin's comments that Mr. Shapiro stands ready, if we open up our files, to try to resolve this matter,

Your Honor, the government has 60 days under the
55 statute within which to bring this action.

Now, the fact is the statute is being followed, and that should not be disrupted when there is absolutely no agreement on the part of the Department of State, or the Department of Internal Revenue, that Mr. Shapiro is going to be guaranteed funds when he gets back to Israel.

Pure and simple, Your Honor, we submit that the agreement of September 4th is one between Israel and Mr. Lewin; that the arrangement is clear; that nothing came up about funds until long after the time was set for the surrender.

So we submit, Your Honor, that trying to conglomerate these various points into some type of due process argument is unavailing for the plaintiffs.

Now, as to one other point, when I made the representation that Mr. Lewin was contacted and it was suggested that papers be brought, it was my understanding that Mr. Minsker, his associate, was called, and that the telephone conversation was with him.

But, at any rate, there is no sense in belaboring that. That is neither here nor there.

The COURT. I am not going to get into that any further, Mr. Rankin.

Mr. RANKIN. I would to point out for the Court's information one case in particular cited in our motion, and that is
the case of the United States versus Sidney A.
56 Brodson, 241 F.2d 107, cert. denied, 354 U.S. 911.

The COURT. What year and what circuit?

Mr. RANKIN. That is the Seventh Circuit, Your Honor, and cert. denied.

The COURT. What year?

Mr. RANKIN. In 1957 cert. was denied, and 1957 in the circuit court, also.

The COURT. All right.

Mr. RANKIN. That was an allegation of denial of due process of law, because the jeopardy assessment would deprive him of funds with which he could litigate the later tax case, the same as here.

The COURT. All right.

The court has before it obviously now a motion for a preliminary injunction, which, if granted, must comport with the standards laid down in the Virginia Jobbers case, which is so

well known that it is needless for the court to repeat the standards therein set forth.

The court also has the government's motion to dismiss, largely on jurisdictional grounds, on the basis that they say the Enochs case is applicable and that any exceptions set forth in the Enochs case standard cannot be met by the plaintiffs in the case at bar.

The court will receive these papers this afternoon and,
as it indicated earlier, it only had a brief opportunity
57 to peruse them.

In view of the importance of the issues raised, and the fact that both parties are entitled to the considered opinion of the court, and there being no reason apparent to the court why an additional 24 hours would injure the interests of anyone, the court will sign an order tomorrow morning extending the temporary restraining order only for the period of time necessary for the court to get out its opinion, and, as indicated, not in excess of more than 24 hours from five o'clock today.

In you want to present an order to that effect, Mr. Lewin, to morrow morning, after showing it to Mr. Rankin, it is all right.

But I think the Government of the United States, knowing at least Mr. Rankin as I do, will abide by that without a formal order.

Mr. RANKIN. Yes.

Mr. LEWIN. Your Honor, if we can get a representation from the government that that will be abided by, then we do not need a formal order.

Mr. RANKIN. We will abide by that, Your Honor.

The COURT. I knew you would, and I know you will. All right.

If you want to submit any other papers, you had better
burn some midnight oil, like I used to do, and have them
58 in my chambers by nine o'clock tomorrow morning.
Otherwise, I will not have time to consider them.

I will call you as soon as I am ready, and probably instead of writing an opinion, will deliver it from the bench, so that you will know precisely the reasons for what I am going to decide, which, as I said before, you are both entitled to.

The court will be in recess until tomorrow morning.

[Whereupon, at this point the court adjourned.]

[Jurats omitted in printing]

572-247 O - 75 - 9

1

[Filed December 21, 1973]

In the United States District Court for the District of Columbia

[Title omitted in printing]

RESPONSE TO PLAINTIFFS' INTERROGATORIES SERVED ON WEDNESDAY, DECEMBER 17, 1973 PURSUANT TO THE ORDER OF THIS COURT OF DECEMBER 18, 1973 ORDERING THAT ANSWERS OR OBJECTIONS BE GIVEN TO THOSE INTERROGATORIES WHICH THROUGH REASONABLE AND GOOD FAITH EFFORTS, THE DEFENDANT, THE COMMISSIONER OF INTERNAL REVENUE, COULD OBTAIN

The defendant, the Commissioner of Internal Revenue, through his attorney, Stephen G. Fuerth, trial attorney, Tax Division, Department of Justice, gives the following answers or objections:

1. Question. On what date did the Internal Revenue Service begin an investigation or inquiry of any kind regarding the income tax liability of Samuel Shapiro for 1970 or 1971?

1. Answer. The investigation into the income tax liability of Samuel Shapiro for the years 1970, 1971 and 1972 was first assigned to a special agent for investigation on September 17, 1973. However, because of a prior commitment to be on jury duty, the agent did not actually commence any investigation until September 24, 1973.

2.(a) Question. Was there any communication between officers or employees of the United States Department of Justice, including representatives of the Office of the
2 United States Attorney for the Southern District of New York, with any agent of the Internal Revenue Service with regard to this matter?

2.(b) Question. State the times, places and participants with regard to any such communication.

2.(c) Question. State the contents of any such communication and whether done orally or in writing.

2. (a), (b), (c) Answer. This interrogatory is objected to as being too broad in that it seeks information with respect to every employee of both the Department of Justice as well as every employee of the Internal Revenue Service; the information sought is irrelevant and immaterial to the matters presently before the Court; it is burdensome and harassing and calls for interoffice communications which are privileged.

3. Question. State the basis for the assessment in the amount of $6,843.68 for the income tax liability of Samuel Shapiro for 1970.

3. Answer. This interrogatory is objected to on the grounds that this Court lacks the necessary jurisdiction to go into the merits of the tax liability of the plaintiff, Samuel Shapiro, and as such the information herein sought is irrelevant and immaterial to the matters presently before the Court.

4. Question. State the basis for the assessment of $85,876.73 for the income tax liability for Samuel Shapiro for 1971.

4. Answer. This interrogatory is objected to on the grounds that this Court lacks the necessary jurisdiction to go into the merits of the tax liability of the plaintiff, Samuel Shapiro, and as such the information herein sought is irrelevant and immaterial to the matters presently before the Court.

3 5.(a) Question. State when agents of the Internal Revenue Service first learned that Samuel Shapiro would be extradited from the United States.

5.(b) Question. State the name of the agent who received this information and from whom he received it.

5.(c) Question. State the date which was communicated to the Internal Revenue Service as the date for the extradition for Samuel Shapiro.

5. (a), (b), (c) Answer. Special Agent Albert Felberg, the special agent assigned to the investigation of this case, first learned of the existence of deportation and extradition proceedings on October 31, 1973, when he interviewed Mr. William B. Gurock, Acting Chief Trial Attorney, Immigration and Naturalization Service, Department of Justice, at which time he was advised that extradition proceedings had been instituted in the Courts and were presently on appeal, but was not advised that any date for departure had been set. The first time Special Agent Felberg was advised that any date for the plaintiff Samuel Shapiro's, departure had been set was on or

about November 28, 1973, when he interviewed Colonel Moshe Malchi, Counsel of Israel, who advised Special Agent Felberg that the plaintiff, Samuel Shapiro, was due to depart the United States on December 9, 1973. Prior to that date neither Special Agent Felberg nor any other agent working on the ivestigation of Samuel Shapiro's income tax liabilities for the years 1970, 1971 and 1972 had any knowledge of the date of Samuel Shapiro's departure from the United States.

6. Question. State why no effort was made by the Internal Revenue Service to inquire from Mr. Shapiro directly regarding his financial records for 1970 and 1971 before the levying of the jeopardy assessment.

4 5. Answer. This interrogatory is objected to as calling for information which is irrelevant and immaterial to the matters presently before the Court.

7. Question. State what records, if any, of Samuel Shapiro would be relevant and material in establishing whether or not the assessments made on December 6, 1973 are valid.

7. Answer. This interrogatory is objected to on the grounds that the defendant, the Commissioner of Internal Revenue, does not have any present knowledge of what records, if any, that Mr. Shapiro possesses, and thus is not in a position to state which of these records might be relevant and, additionally, objects on the grounds that this interrogatory calls for a legal conclusion.

8.(a) Question. State the date on which the District Director of Internal Revenue approved the issuance of the jeopardy assessment made on December 6, 1973.

8.(b) Question. State the names of the Internal Revenue Service officials who recommended and approved such jeopardy assessment.

8. (a) (b) Answer. The jeopardy assessment was approved on December 6, 1973. The following individuals recommended the making of the jeopardy assessment: Richard Conde, Internal Revenue Agent; Colin McDonald, Assistant Regional Counsel; David Lavin, Review Staff; Harry P. McCall, Chief, Intelligence Division; Domenick Bonanti, Chief, Collection Division; Richard Fogwell, Chief, Audit Division. The jeopardy assessment was approved by George S. Albert, Assistant District Director for Elliott H. Gray, District Director.

5 9. Question. State the precise liability that the Internal Revenue Service will assert in the notice of deficiency it will file with regard to Samuel Shapiro.

9. Answer. This interrogatory is objected to on the grounds that the statutory notice of deficiency is pursuant to the provisions of Section 6861(b), not required to be sent to the plaintiff, Samuel Shapiro, until February 4, 1974, and does not presently exist, and further objects on the grounds that this Court lacks the necessary jurisdiction to go into the merits of the tax liability of the plaintiff, Samuel Shapiro, and as such the information sought herein is irrelevant and immaterial to the matters presently before the Court.

STEPHEN G. FUERTH,
Trial Attorney,
Tax Division, Department of Justice,
Washington, D.C. 20530.

[Jurat omitted in printing]

1 [Filed December 21, 1973]

In the United States District Court for the District of Columbia

[Title omitted in printing]

SUPPLEMENTAL RESPONSE TO PLAINTIFFS' INTERROGATORIES SERVED ON MONDAY, DECEMBER 17, 1973 PURSUANT TO THE ORDER OF THIS COURT OF DECEMBER 18, 1973 ORDERING THAT ANSWERS OR OBJECTIONS BE GIVEN TO THOSE INTERROGATORIES WHICH THROUGH REASONABLE AND GOOD FAITH EFFORTS THE DEFENDANT, THE COMMISSIONER OF INTERNAL REVENUE, COULD OBTAIN

The defendant, the Commissioner of Internal Revenue, through his attorney, Stephen G. Fuerth, trial attorney, Tax Division, Department of Justice, supplements the answer to interrogatory No. 9 previously given on December 19, 1973.

9. Question. State the precise liability that the Internal Revenue Service will assert in the notice of deficiency it will file with regard to Samuel Shapiro.

9. Answer. The statutory notice of deficiency was mailed to Samuel Shapiro on December 21, 1973, and a true copy is attached hereto as Exhibit A.

STEPHEN G. FUERTH,
Trial Attorney,
Tax Division, Department of Justice,
Washington, D.C. 20530.

The above statement is true to the best of my knowl-
2 edge and belief based upon conversations with personnel of the District Director's office, Manhattan District, Internal Revenue Service.

STEPHEN G. FUERTH.

[Jurat omitted in printing]

Address any reply to: P.O. Box 3100 Church St. Sta., New York, N.Y. 10008
Department of the Treasury

Internal Revenue Service
Date: DEC 21 1973 In reply refer to: AU:R:900
Tel: 264-3109

Mr. Samuel Shapiro
208 Maple Avenue
Monsey, New York 10952

Dear Sir:

In accordance with the provisions of existing internal revenue laws, notice is given that the determination of your income tax liability for the taxable years ended December 31, 1970 and December 31, 1971 discloses deficiencies in tax aggregating $84,506.39, addition to the tax for delinquency under Code section 6651(a) of $1,284.47 for the taxable year ended December 31, 1970, additions to the tax for negligence under Code section 6653(a) of $4,225.33 for the taxable years ended December 31, 1970 and December 31, 1971 and addition to the tax for failure to substantially prepay estimated tax under Code section 6654(a) of $164.42 for the taxable year ended December 31, 1970, as shown in the statement attached.

Assessment of the deficiencies and additions to the tax mentioned has been made under the provisions of the internal revenue laws applicable to jeopardy assessments.

If you decide to contest this determination, you must do so by filing a petition within 90 days (150 days if you are outside the States of the Union and the District of Columbia) from the date of this letter with the Tax Court of the United States in accordance with its rules. A copy of the rules of the Court may be obtained by writing to the Clerk, Tax Court of the United States, Box 70, Washington, D.C. 20044.

Very truly yours,

Donald C. Alexander
Commissioner

By Everett J. Gray
District Director

Enclosure:
Statement

EXHIBIT A

BEST COPY AVAILABLE

STATEMENT OF SAMUEL SHAPIRO, 208 MAPLE AVENUE, MONSEY, NEW YORK 10952

Tax Liability for the Taxable Years Ended December 31, 1970 and December 31, 1971.

INCOME TAX

Taxable year ended	Deficiency	Delinquency addition	Negligence addition	Underestimated addition
December 31, 1970	$5,137.89	$1,284.47	$256.90	$164.42
December 31, 1971	79,368.50	----------	3,968.43	----------
Totals	84,506.39	1,284.47	4,225.33	164.42

The stated deficiencies and additions to the tax are based on adjustments and explanations set forth in detail below.

It is determined that you did not file an income tax return for the taxable year ended December 31, 1970 within the time prescribed by law, nor have you shown that such failure was due to reasonable cause, therefore the 25% addition to the tax provided by section 6651(a) of the Internal Revenue Code of 1954 is asserted for that year.

It is determined that part of the underpayment of tax for the taxable years ended December 31, 1970 and December 31, 1971 is due to negligence or intentional disregard of rules and regulations therefore the 5% addition to the tax provided by section 6653(a) of the Internal Revenue Code of 1954 is asserted for those years.

It is determined that you failed to substantially prepay estimated tax for the taxable year ended December 31, 1970 therefore the addition to the tax provided by section 6654(a) of the Internal Revenue Code of 1954 is asserted for that year.

TAXABLE YEAR ENDED DECEMBER 31, 1970

DETERMINATION OF TAXABLE INCOME AND COMPUTATION OF TAX

Income		$18,000.00
(a) Other income		
Deductions:		
(b) Standard deduction		1,000.00
(c) Exemption	625.00	1,625.00
Taxable income determined		16,375.00
Tax on above		4,599.69
Plus: Self-employment tax		538.20
Corrected income tax liability		5,137.89
Income tax liability disclosed by return		(1)
Deficiency in income tax		5,137.89
Addition to the tax under section 6651(a)—25% of $5,137.89		1,284.47
Addition to the tax under section 6653(a)—5% of $5,137.89		256.90
Addition to the tax under section 6654(a)—See Schedule A		164.42

[1] None filed.

EXPLANATION OF ADJUSTMENTS

(a) It is determined that you realized unreported taxable income from unexplained bank deposits at the 1st National City Bank in the amount of $18,000.00.

(b) You are allowed the standard deduction provided by Code section 141.

(c) You are allowed one exemption, for yourself, as provided by Code section 151.

572-247 O - 75 - 10

TAXABLE YEAR ENDED DECEMBER 31, 1971

ADJUSTMENTS TO INCOME AND COMPUTATION OF TAX

Adjusted gross income disclosed by return	$1,600.00
Increase (decrease) in income:	
(a) Income from illegal activities	137,280.00
(b) Standard deduction	(1,500.00)
(c) Exemption	(675.00)
	135,105.00
Taxable income adjusted	136,705.00
Tax on above	78,783.50
Plus: Self-employment tax	585.00
Corrected income tax liability	79,368.50
Income tax liability disclosed by return	(1)
Deficiency in income tax	79,368.50
Addition to the tax under section 6653(a)—5% of $79,368.50	3,968.43

[1] None.

EXPLANATION OF ADJUSTMENTS

(a) It is determined that you realized unreported taxable income in the amount of $137,280.00 for the taxable year ended December 31, 1971 from your activities as a dealer in narcotics, computed as follows:

Gross income from hashish sales	$381,680.00
Less: Costs	244,400.00
Net income	137,280.00

(b) You are allowed the standard deduction provided by Code section 141.

(c) You are allowed one exemption, for yourself, as provided by Code section 151.

1 [Filed December 21, 1973]

United States District Court for the District of Columbia

[Title omitted in printing]

TRANSCRIPT OF PROCEEDINGS

* * * * *

The above-entitled cause came on for further hearing on Plaintiffs' motion for preliminary injunction and Defendants' motion to dismiss before the Honorable Charles R. Richey, United States District Judge, commencing at 3:00 p.m.

APPEARANCE

On Behalf of the Plaintiffs: HERBERT J. MILLER, JR., Esq., and MARTIN D. MINSKER, Esq.

On Behalf of the Defendants Secretary of State and Acting Attorney General: ROBERT RANKIN, JR., Esq., Assistant United States Attorney, JOHN L. MURPHY, Esq., Chief of Department, Criminal Division, Government Regulations Section, and GIL ZIMMERMAN, Esq., Assistant United States Attorney.

2 On Behalf of the Defendant Commissioner Internal Revenue Service: STEPHEN G. FUERTH, Esq., Tax Division, Department of Justice.

* * * * *

3 PROCEEDINGS

The DEPUTY CLERK. Civil Action Number 2172–73, the case of Shapiro, et al. versus the Secretary of State, et al.

For the Plaintiffs, Mr, Miller and Mr. Minsker; for the Defendants, Mr. Rankin, Mr. Zimmerman, Mr. Fuerth, and Mr. Murphy.

Mr. MILLER. If the Court please, Herbert J. Miller, Jr., appearing for the plaintiff.

Mr. Lewin was unable to be here today because of his religious faith requiring him to be home at sundown.

The COURT. All right.

Mr. LEWIN. He will not be able to make it.

I was down here on another matter so he asked that I fill in for him.

I would also like to suggest to the Court that an answer to an interrogatory was served on Mr. Minsker of our office at approximately 12:20. It's a rather remarkable document. It indicates that Mr. Shapiro derived an income of about $381,000.00 and $680.00 from hashish sales.

The COURT. I have a copy that my law clerk handed to me when I came off the bench, Mr. Miller, and I have read it.

Mr. MILLER. I might say for the record, if the Court please, Mr. Lewin, before he left for home called Mr. Shapiro and was informed by Mr. Shapiro that the charge is false.

And I would only suggest to the Court that if this is a fact, if in fact he did sell hashish in that amount, it would appear to me that the cause of justice is better served not by sending this man out of the country, but by conducting an investigation and returning an indictment in this country.

The COURT. Mr. Rankin, what do you say about that, having come from the former Chief of the Criminal Division of the United States Department of Justice?

Mr. RANKIN. I beg your pardon?

The COURT. What do you say about that, having come from the former head of the Criminal Division of the United States Department of Justice?

Mr. RANKIN. Your Honor, we have consistently argued in this case that this Court lacks jurisdiction.

The COURT. I know you have.

Mr. RANKIN. We have argued throughout that the matter of this tax proceeding is really irrelevant to the case before this Court.

Obviously, we knew of the underlying basis of the tax assessment. It was going on in New York. We didn't know the final figures, the final computations. We were aware of this claim of dealing in hashish.

It was very frustrating not to bring this before the Court, but we were consistently arguing that this Court lacked

jurisdiction and those matters were proper for litigation in the appropriate tax forum at a later time.

This morning, when we learned that this statutory notice had gone out in due course in the proceedings in New York, it was obviously incumbent upon us to advise this Court of that because of the action that this Court was to take this afternoon.

Also, obviously, we could not withhold this information and present it at a later time because we thought it was irrelevant. It was important to the Court so we did.

Your Honor, there was absolutely no deliberate effort on the part of the Government to have this come out this afternoon, obviously. It came out today; when it came to our attention, we brought it before the Court.

We would submit, Your Honor, that this really changes nothing as far as the case which was before this Court except possibly in one way: We have argued that this Court lacks jurisdiction; plaintiff knew that he was going to receive a statutory notice with this explanation in it or with some explanation in it at some time before February 4th; he was going to have to at some time litigate that tax case and attempt to have himself represented properly at that Tax Court.

He has claimed throughout this litigation that by being in Israel, he will not be able to do that. It has been our consistent claim that he can make a due process argument in the course of that tax litigation and that this Court should not interfere with an extradition which is based on a treaty between this Government and a foreign Government.

He has the same right now to litigate in a Tax Court as he would have had had he gotten the notice two weeks from now or February the 4th; so it doesn't really change the situation.

Except, Your Honor, it does assist in the argument to show that this Court should not exercise equity jurisdiction even if it deemed it could consider granting injunctive relief.

We have consistently argued the doctrine of clean hands. The plaintiff, as the Court is well aware, left Israel, where there is an indictment; the Israel Government wants him; he came to this country.

There is the claim now that he has been dealing in hashish and apparently quite a large dealer.

We suggest, Your Honor, that even if the Court felt that it had jurisdiction to grant injunctive relief, that under the doctrine of clean hands, that this Court should certainly abstain from granting any type of injunctive relief.

The COURT. May I ask you one thing before Mr. Miller arises to speak? I want to address a question to you, if I may, Mr. Rankin.

You will recall the other day that Mr. Miller's partner, more or less as a threshold argument, repeated over and over again, arguing that there can be no forfeiture. He argued that this was tantamount to a forfeiture and an extradition at the same time.

And he went on further to say that the Government must choose between one or the other of the remedies even in the particular circumstances of this case.

Now, what do you want to say about that with particular reference to these additional facts, if they are facts, or assertions? Let's put it that way. That's all they are, I think.

Mr. RANKIN. Your Honor, I think . . .

The COURT. The Court has got to consider them as just assertions now.

Mr. RANKIN. Your Honor, we feel that we have shown that the extradition is appropriate, and this Court clearly lacks any jurisdiction to enjoin an extradition; so that's got to go forward.

Mr. Lewin suggested that we should choose and, therefore, if we want to extradite him pursuant to these negotiations with the Government of Israel, we would have to drop the tax assessment.

But, Your Honor, Congress has provided for this statutory type of jeopardy tax assessment. It was done in the normal course. There is a basis for it.

The COURT. Why didn't you tell me the first time you were here that you knew about this so that the plaintiffs could have made at least some sort of response?

Mr. Miller represents to me that he got this at 12:20 this noon. Was that the time?

Mr. MILLER. It was delivered to us at 12:20 this afternoon to Mr. Minsker. I was down at court. I just saw it fifteen minutes ago.

The COURT. I think that is about the time I got it, I think, when I went into my chambers.

Mr. RANKIN. I think you got it—yes, that's correct.

I got it just a short time before that, Your Honor.

The point is . . .

The COURT. But you did know about it, though?

Mr. RANKIN. Your Honor, we were aware that the tax assessment was based on the fact that this man was dealing in hash.

The COURT. Hashish.

Mr. RANKIN. Hashish.

The COURT. Why didn't you indict him then?

Mr. RANKIN. Your Honor, I tried to explain that we have consistently argued that the Court is without jurisdiction on that point and that should come up in the tax litigation.

The procedures under the . . .

The COURT. You mean it's legal to deal in hashish in the United States?

Mr. RANKIN. I am not saying that, Your Honor, and we aren't dealing with a criminal indictment or the possibility of a criminal indictment in this. . . .

The COURT. You're going to let him go?

Mr. RANKIN. Your Honor, the Southern District of New York is where most of this action is going on, and I'm not dealing with these aspects of the case.

The COURT. All right.

Mr. RANKIN. But I would like to point out that the doctrine . . .

The COURT. It goes to the clean hands argument that you've made. That's what you're saying. Is that the thrust of it?

Mr. RANKIN. The thrust of the point, Your Honor, is that we had to inform this Court when it came out.

The COURT. All right.

Mr. RANKIN. This was only a part of an ongoing proceeding under the statute.

Now, you can't say that I.R.S. should have deliberately held out until February 4th. It wasn't for me to tell I.R.S. when to issue this notice. But once it came out, it was our duty to inform this Court. And we say it has no effect on this lawsuit other than to reaffirm our clean hands argument.

The COURT. Okay.

Mr. Miller.

Mr. MILLER. If the Court please, there is an appearance to me of such a basic unfairness with what is transpiring here.

Certainly, I do not have an acute familiarity with all of the facts. But I do know that to be apprised fifteen minutes before a hearing that a client whom I have assumed is a perfectly honorable man has been engaged in hashish sales in the amount of $388,000.00 is a very startling development, particularly in view of the fact that the Government admits that it had knowledge of that before. And if this gentleman didn't, I.R.S. did.

And I think it was incumbant to make that available to the Court and to us for this reason: Remember, this information was supplied in response, as I understand it, to interrogatories that we served.

And what I say is that if this goes to the clean hands argument, as my worthy confrere suggests, then certainly equity requires that we have an opportunity to rebut this evidence and not have it stand in the record.

I know how I would feel if I were the individual who had a document like that filed with no chance—if I am going to be extradited—with no chance to clear the record, with no chance, if you please, to prove my innocence. And to me it is just another example of how the Government has acted in this case.

11 I think that the Government of the United States, no less than individuals, should be required to abide by the agreements with which they have made. And I submit to the Court that from what I've seen of this case, just as an element of equity and basic fairness, that the Government is not treating this man the way it should be.

Now, they have grabbed two remedies. And I submit to the Court, let them have one or the other. But it is so unfair to take this individual and send him off to perhaps a long time in prison in Israel because he is unable to make bond, because the money has been grabbed by the United States when the United States has moved desperately to make sure that there can be an extradition.

And, furthermore, the fact of all of this urgency escapes me, if the Court please. The Government of Israel was willing to wait for the birth of a child and subsequent thereto and arrange for an orderly disposition of the matter. And then, at the last minute, when the man is going to be extradited, we find that a jeopardy assessment is filed against him and now we find that

the jeopardy assessment is based on an alleged narcotics charge, which I, sir, deny to the Court based on what the client told my partner.

And I think at minimum we are entitled to an opportunity to introduce evidence if that's wrong. Because I'll say to the Court as a citizen, not as a lawyer, that if, in fact,

12 this man engaged in this type of transaction, I submit that that man should remain in the United States, should be indicted and tried, and if found guilty, incarcerated, because that is no small potatoes when it comes to the drug traffic. I know that of my personal knowledge.

Mr. Minsker would like to address the Court, Your Honor.

Mr. MINSKER. Your Honor, if the Court would indulge me because I am somewhat more familiar with the jurisdictional or legal argument, I would like to set that out.

Your Honor will recall our complaint states a claim in explicit terms of a deliberate denial of procedural due process in the making of this assessment on the very eve of extradition.

These facts, jurisdictionally and legally, disclosed at the last minute go to the very heart of that point.

Your Honor will recall that we have consistently tried to elicit what the basis, the actual basis, of the jeopardy assessment was. Your Honor will recall that we served an interrogatory to that effect. There was a discussion about the Government's inability under the circumstances, physical time circumstances, to get responses.

We had a little hearing about that. Your Honor directed Mr. Rankin and the Government counsel to do

13 their level best.

The next day—I believe it was approximately at 12:00 o'clock—they served their responses to that interrogatory which with respect to interrogatory number 9, stated—and I don't have the documents they served—I think they said that this information sought is irrelevant and also the notice of deficiency or the information sought doesn't exist at this time. I think they said that the notice doesn't exist at this time.

That was before the hearing on the preliminary injunction.

Then, as Your Honor knows, the matter was decided and was put over for today. Then at the last minute today, they disclosed what is the critical basis of the majority of the jeopardy assessment.

Now, Your Honor will recall that the amount of the assessment, the funds they assessed, they tied up all the funds under security and have been claiming something like $90,000.00. I don't have the figures in front of me.

Most of that is now attributed to this last-minute disclosure.

Your Honor identifies as the critical point the question of forfeiture. There can be no question but that Your Honor could establish a jeopardy asssessment, which was admitted by the United States or the Government, to be without any basis.

Now, we have alleged a deliberate delay or a deliberate
14 combination of extradition and jeopardy assessment procedures in order to prevent Mr. Shapiro to come into court and defend on the jeopardy assessment basis.

It turns out that the critical basis was this business of hash dealing. It is disclosed at the very last minute before we can respond to it in this Court as the basis.

It is no longer a question now under the Enoch case, the Government's proof as to the basis of what they have done has to be taken and has to be assumed by the Court to be correct; the Government has told the Court what the basis of most of the assessment is.

So it is no longer the Enoch question case of should the Government be required to litigate in advance in an injunction action before it gets the tax money what the Congress has said it should be litigated afterward.

The Government has now told the Court what the basis of the assessment was. The telling of it to the Court at the very last minute when the Court is expected to act on the TRO, which if the Court denies and there is no other relief, Mr. Shapiro disappears from the jurisdiction.

It fits right in squarely with the conceptual allegations of all of our complaints. I don't have them all in front of me right now, but it fits right in with the *Phillips* v. *CIR* case; and it fits right in with the language in Enoch and the language in
Nut Margarine, where the Supreme Court said: "In spe-
15 cial and extraordinary circumstances where what the Government has done is an exaction in the guise of a tax," then the tax assessment is no bar to forcing a lifting of the jeopardy assessment.

I am not as experienced . . .

The COURT. What you are really saying is that under those circumstances or similar circumstances, there may be equity

jurisdiction which would permit the Court to issue the injunction you seek.

Mr. MINSKER. Precisely, Your Honor.

The COURT. I know what you're talking about.

Mr. MINSKER. Precisely.

And the Government has itself created the very circumstances by this last-minute disclosure.

If I may try the Court's patience. . . .

The COURT. Let me ask you another question and then you can come back to it.

As I understand this agreement or recall it, the matter of bail was not one of the three items in the agreement between this country and Israel initiated by your good offices through the Embassy here while he went back to Israel and prepared to stand trial there.

Mr. MINSKER. I believe there was. . . .

The COURT. Isn't that specifically correct?

Mr. MINSKER. I believe it is, yes.

16 The COURT. You alluded to it . . .

Mr. MINSKER. Yes, I did.

The COURT. . . . and talked about it . . .

Mr. MINSKER. Right.

The COURT. . . . but it was not a part of a specific agreement.

Mr. MINSKER. I believe the specific agreement was that Mr.—okay, let me read it to you. That's the part that Mr. Lewin is most intimately familiar with, but let me read to you from . . .

The COURT. They think he's okay.

Mr. MINSKER. Pardon?

The COURT. According to the letter, they think he's okay

Mr. MINSKER. That's right.

Let me read to Your Honor from the letter of December 11, 1973, Exhibit 4, page 2: "As reflected to me from the Department of State, dated September 19, 1973, the assurances to Mr. Shapiro by the Government of Israel were the following:

"These are quoted precisely as stated in a letter to me.

"One, that extradition be delayeduntil after the birth of his child, expected to be November, and the religious ceremonies incidental to its birth.

"Two, that Shapiro be allowed to remain at large in
17 Israel until acquittal or conviction.

"And, three, that trial be continued."

Now, I believe what happened—and this should be checked with the pleadings—but I believe what happened is that Mr. Lewin said to the State Department that these are the three conditions; and then Israel said, "Well, we will let him be enlarged provided he makes a bail of 250,000 pounds."

So I would submit to Your Honor that the bail requirement was a specific part of the agreement because the bail requirement was subordinate . . .

The COURT. All right.

Let's assume that that's correct and you've refreshed my recollection, and I think you are correct.

But there was no specific agreement in the $55,000.00 given as security to bondsmen in New York in addition to funds totalling about $35,000.00 in U.S. bank accounts was precisely and specifically agreed to be used for the bail bond in Israel, was it?

Mr. MINSKER. That is correct, Your Honor.

Of course, there was no specific agreement as Your Honor has just spelled it out nor could there be, because there was no inkling on the part of Mr. Shapiro or his counsel that the Government would simultaneously be conducting in secret a tax investigation and there could be no inkling on counsel's part or anybody's part that the money that was going to be used was going to be tied up with a jeopardy assessment.

And, of course, it was known to the Government that this money was tied up under security because it was tied up under securities that the Government suggested.

There was no way that Mr. Lewin could have negotiated for them not to seize that money and take it away when the whole course of the Government's conduct has been such that there wasn't even an inkling or suggestion on the part of the Government that anybody was even investigating or auditing or looking at Mr. Shapiro, much less thinking of tying up the funds.

But Your Honor is correct as Your Honor states the absence of that specific provision from the agreement.

If I may say, Your Honor, our complaint will rest on two grounds. It rests both on the denial of procedural due process by the deliberate calculated seizure and on the denial of due process and the denial of the requirement of fair-dealing and

the Government keeping its agreements as set forth in the Giglio case.

On either ground, if we're correct and if our legal arguments are good as to jurisdiction, we submit we've shown the requisite factual likelihood of success on the merits to be entitled to an order.

We submitted that in papers repeatedly, Your Honor, and I submit what has happened today establishes beyond peradventure that we have had the requisite of likelihood of success of showing an unconstitutional combined use of extradition and jeopardy assessment techniques to get the would-be tax litigator out of the jurisdiction before you bring the assessment.

The Government has—again, I must emphasize that the whole logic—the whole logic of the Enoch case is to say—the whole justification—the whole principle of it is to say—that the reason the tax injunction statute forbids a Court from interfering with the collection of taxes is because otherwise litigants could tie up the Government before it gets the money in litigation.

And Congress has made a judgment: These matters should be litigated subsequently.

So the Court said and it's developed its two-pronged test which fits in with the logic of that approach, saying that you have to assume on the most liberal facts that the Government can make its claim.

But that whole logic falls out when the Government tells you that the basis of the claim is narcotics dealing or hashish. And when they deliberately delay to the last minute, Your Honor, to disclose that so that we can't respond, they've in effect, committed—they've, in effect, done it again. They've, in effect, used the procedures of this Court, as it were, in combination with jeopardy assessment and the extradition proceedings to get the property and get the man out of the jurisdiction.

They're delayed until the last minute. It seems to be fairly apparent from the admissions of knowledge that that delay was a knowing delay to tell us what the basis of the jeopardy assessment was.

Now, we can't respond to that basis. Were the order not granted, he'd disappear from the jurisdiction tomorrow.

In a sense, not only does it establish the requisite facts necessary to put this case squarely within the Nut Margarine language of an exaction in the guise of a tax, but it almost establishes it on an independent basis which could be set out in an amended complaint asking for declaratory injunctive relief, although, obviously, we don't have time to write that and file it.

At one point in one of the pleadings we filed we said, "What does it mean to tax in the United States of America under the Constitution and laws of our Country?"

And, to me, what the words "to tax" mean, in light of the principles of procedural due process, the time-honored principle of procedural due process which are the very pillar of an organized and orderly society, the words "to tax" mean to me the Government shall take the property of a citizen under claim of right with adequate opportunity at some stage for the citizen to contest the claim.

21 Those are what the words "to tax" mean in the entire fabric of our constitutional and statutory law.

What has the Government done here? Has it taxed or has it done something else?

It has seized the property in a fashion and in a manner calculated to and which, in effect, does foreclose the taxpayer from contesting the claim of right of the Government of the United States.

I do not understand what it can mean in the language of the Supreme Court of the United States nor in the language of the Constitution of the United States. I don't understand what it can mean to say, "You've done something which is an exaction in the guise of a tax." if it doesn't mean the conduct which has been engaged in in this case.

The Government has not taxed this man when they put that jeopardy assessment in force; it exacted; it seized; it forfeited in the guise of a tax.

If the Court has no more questions of me, I'll take my seat.

The COURT. Mr. Fuerth, would you like to add something?

Mr. FUERTH. Your Honor, I would just like to respond on behalf of the Commissioner of Internal Revenue.

The COURT. All right.

Mr. ZIMMERMAN. And I would like to advise the
22 Court with respect to an aspect of the clean hands doctrine which I believe has not been touched upon.

The COURT. All right.

But if you say anything new, I am going to give the other side a chance to respond.

Mr. FUERTH. Well, Your Honor, I merely want to say that I deeply resent the implications that there was any deliberate delay or fact-hiding from this Court.

It was our position then, at the time that this action was instituted, and our position is now that this Court lacks the necessary jurisdiction that's been spelled out to go into the tax liability.

That is the reason we didn't bring it before this Court. That is the reason we didn't mention it.

But the Service, the Internal Revenue Service, was in due course and, rather than delaying, with utmost speed working on this matter and was preparing—was preparing the statutory notice which, after all, all that document is is a ticket to the Tax Court. That merely provides an entry into the Tax Court.

And rather than sitting on its hands and delaying and holding this thing back until February 4th, which it would have done by right, it attempted to work as fast as possible.

And it was just by happenstance that it happened that it was going to come out today. Just that.

23 Now, I could have just as easily told the Service, "It's going to upset the applecart if the statutory notice were to be issued today. Hold up."

But I felt that that would have been inappropriate for me to meddle in their affairs. I deliberately allowed them to go along in a normal procedure as they would have treated any other taxpayer.

When I learned that the statutory notice was going to come out today, not in any effort to influence this Court and not in any effort to prejudice anyone, but in the effort of fairness, I felt it was my duty to reveal it to this Court.

The COURT. I'm glad you did it.

Mr. FUERTH. I felt that if the taxer has received it on Tuesday and I had presented it to Your Honor then, Your Honor would have been quite justifiably upset with us if we had not brought it to Your Honor's attention as soon as we knew about it.

But there has never been any attempt on this part of the Government to hide anything from you, and I resent that. Your

Honor, the implication that we were deliberately holding things back.

It is our position that it is not in this Court the question of the taxpayer's liability is to be litigated. It is our position that it is to be litigated in a refund suit or in a Tax Court, which, I might add, now that the statutory notice has been issued, there is no longer a remedy in the future.

In other words, we are no longer talking of a situation where the taxer has to wait. He can walk in on Wednesday morning and file a petition with the U.S. Tax Court.

The COURT. Couldn't he come into this Court, too?

Mr. FUERTH. No, I . . .

The COURT. Don't we have concurrent jurisdiction on a suit for refund?

Mr. FUERTH. Only if he pays the tax in full, waits the necessary six months, if the claim is rejected; from that day on can he sue. So there would be a longer period of time.

And I might add it would not be this Court, in any event, that he would come in. If he still resides in New York in the Southern District, it would be that Court that he could go into or in the Court of Claims.

But in no event would the question of the tax liability be litigated in this Court.

The COURT. Because of his residence?

Mr. FUERTH. Pardon?

The COURT. Because of his residence?

Mr. FUERTH. Because of his residence, yes, Your Honor.

The COURT. All right.

Mr. FUERTH. Thank you.

The COURT. Mr. Zimmerman.

Mr. ZIMMERMAN. Gil Zimmerman, Assistant United States Attorney.

Mr. Rankin came in to discuss with me the clean hands problem this afternoon relating to me the latest occurrence, which has been brought to the Court's attention.

Rather than burden him to be the intermediary to convey what I am about to say to the Court, I told him I would accompany him and address the Court directly. And I thank the Court for the opportunity to be able to address the Court.

The essential element of the clean hands doctrine is not the other fellow's bad conduct. It's the man who is coming into Court to seek relief.

And as Your Honor may recall the maxim: "Equity leads a fellow who makes his bed where he finds it."

That's not the appropriate exact wording, but you recall the maxim.

I handled the case of a DeGaster versus Fowler, Your Honor, on behalf of the United States. Judge Jones in that case, in an opinion rendered at 247 Fed. Sup. 511, applied the proposition that the Court on its own, sua sponte, in the interest of its administration of its own affairs, will not interfere on someone to whom the clean hands doctrine applies.

And at page 518, said: "Moreover, by applying the equitable clean hands maxim here and thus denying the plaintiffs the equitable relief they seek, this Court does not declare, forfeit, or address the merits of the proposition," or anything else. It simply closes its door.

"This Court simply shuts its door to the plaintiffs by refusing to interfere on behalf of them to acknowledge their rights, if any, and to award them any remedy," citing the Supreme Court cases that are pertinent.

And that decision, Your Honor, was affirmed by the Court of Appeals reported at 354 Fed. Second 515, per curia, on the statement that "this Court being in general agreement with the excellent opinion filed by the District Court in the case."

In other words, because of the fraud or the element of bad faith on the part of the plaintiff, the Court simply said, "I will not entertain you."

What do we have here? The Government's statement of facts indicates that there is a man wanted in Israel for a number of . . .

The COURT. I know that.

Mr. ZIMMERMAN. Very well.

He is an alien illegally in this country. He has violated the laws of this country to come here. The Government of Israel has asked for his extradition. He has an absolute remedy to go in and defend on that tax case.

If the Government cannot make out a case there, there is no forfeiture. That's a ridiculous argument.

572-247 O - 75 - 11

So all I can say, Your Honor, is look at it. The Government claims that here is a man doing wrongdoing in this country. The State of Israel wants him for wrongdoing in that country. And he is an alien illegally in this country.

It seems to me an equity court should close its doors exactly as Judge Jones did in that case.

The COURT. Mr. Miller.

Mr. MILLER. If the Court please, I am informed that my partner, Mr. Lewin, has responded to each and every one of those statements. I would add but one thing.

If the Court of the United States can accept unsupported allegations as fact upon which to base a determination of lack of clean hands, then I think that the due process clause of the United States has gone by the boards.

And I submit to this Court that we have an allegation that the man is wanted in Israel may be an indictment. I assume that does not mean he's guilty.

We have an allegation that he sold hashish. That does not prove to me that he did.

And I submit to the Court that it would make a mockery of the judicial process to take that unsupported hearsay comment coming in at the last minute and say that ruins or denies or takes the clean hands doctrine out of the case.

And I submit that argument isn't worth anything.

And I think that if the Court will look precisely what the Government has done in this case to this individual—I mean it's all well and good when the Commissioner of Internal Revenue can come on and state what this part of the Government is doing and another lawyer to come and state what this part of the Government is doing—what we are requesting the Court is to see what the United States of America is doing in this case as one Government.

Thank you.

The COURT. All right, gentlemen.

I told all of the parties that the Court would rule today at 3:00 o'clock. Obviously, of course, in view of this eleventh-hour development, it was only fitting and proper, in the opinion of the Court, to permit both sides to give the Court the benefit of additional argument.

I will say too, Mr. Miller, by way of an aside, although it doesn't make any difference one way or the other, it looks to me that you have been a little outnumbered today in terms of

manpower. Each time the Court has had a hearing on this, we have had one more counsel either at the table or in the courtroom.

In any event, the Court has very carefully considered the final pleadings that have been drawn by counsel for both parties. I hope that the lawyers, at least those on the plaintiffs' side, have been paid by the word as they used to be in England, because they have been under very difficult circumstances and have done a lot of hard work.

Now, to get down to the ruling of the Court: The Court did issue a temporary restraining order on December the 14th and then extended that again by agreement of the parties until today at which time it was understood that the Court would rule on the application of the plaintiffs for a preliminary injunction.

In dealing with this matter, the Court must first address itself it seems to the question of jurisdiction which has been raised by the Government. They first contend that the Court lacks jurisdiction to enjoin the execution of a warrant of extradition which has been duly issued and, in effect, approved by the United States District Court for the Southern District of New York in the Second Circuit.

And the Court, after careful study and with some reluctance, I might add, finds it necessary to agree with that conclusion.

It will add that it has come to this conclusion, not only with reluctance, but with some difficulty. Were it not for the fact that a sister Judge had made this decision and the appellate process had been exhausted and that this had been done in another District pursuant to an international treaty, or a treaty between the United States and Israel, the result here might well have been different.

The second contention with respect to jurisdiction is that the Court lacks jurisdiction over the U.S. Marshal for the Southern District; and I think on its face, consistent with what the Court has previously said, that that is also true and the Court so holds.

In addition, the Government contends that this is an unconsented suit against the United States and, therefore, it lacks jurisdiction on that ground also and that it can't grant injunctive relief against I.R.S. jeopardy assessments and that there has been no denial of due process within the meaning of the exception set forth in the case of

Enoch versus Williams Packing Company, decided by the Supreme Court of the United States in 1962. If I recall, the Chief Justice of the United States wrote that opinion—the former Chief Justice, Mr. Justice Warren.

I want to say here and now, in view of what the Court has learned today, that the Government was aware from the time this suit was filed and prior thereto, that there was a claim for these back taxes based on illegal trafficking in narcotic drugs, in this case hashish.

For the like of me, I cannot understand why that was not made known, although perhaps the Government was under no obligation to do so.

What, in effect, the plaintiff appears to be saying is set forth in a memorandum entitled "Opposition to Motion for Preliminary Injunction."

And I quote: "Not to avoid trial in Israel, but to be free on bail in Israel while he contests the charges there lodged against him."

Now, while that may have been an implicit understanding on the part of the plaintiffs, particularly the main plaintiff, that he would be guaranteed bail in Israel, there was never any agreement that the bail money that would be posted
32 in Israel during the time of the proceedings against him there would come from the monies that were seized in the United States in the amount of approximately fifty-five thousand dollars.

I think upon careful consideration, upon all the facts in the entire record, that this case does not amount to a violation of due process. It does not fly in the face of the Enoch standard as claimed by able counsel for the plaintiff.

The Court, as it has previously said, has before it an uncontested order of extradition. And following the entry of that order, which was approved by the Second Circuit, this jeopardy assessment was levied.

While the Government would preferably have made known the basis for its claim, I don't think that it is necessarily fatal or tantamount to a denial of due process for its failure to disclose such a basis for its assessment before now or until February 4th, at least.

So we come down to the fundamental question, as the Court has indicated, as to whether the Court has jurisdiction; and the Court finds that it does not.

As to the due process claim of the plaintiffs, the Court will say this: The standard is whether the Government has a chance of ultimately prevailing on the basis of the information available to it and available to the Court. And only if it is apparent under the most liberal view of the law and the facts that the United States cannot establish its claim, may a suit for
33 an injunction be maintained.

Now, that is a principle of law laid down in Enoch; and I just don't find and cannot find, as much as I really do not like the activity of the Government in this case—I will tell you frankly I don't, because I think this could have been at least disclosed at the time or some opposition be made before this man's departure—but, nevertheless, looking at it from the most liberal point of view and in the most liberal light as to the law and facts in favor of the plaintiff, I don't see how the Government can fail to establish its claim; and I think the suit for injunction and the other relief must be denied.

That means that the Court is without jurisdiction, and the preliminary injunction will be denied.

I do not feel and find that there is a likelihood that the plaintiffs will be able to prevail on the ultimate merits. I don't think the public interest will be served by the granting of the injunction.

As to the question of irreparable injury, sure, the male plaintiff will be in Israel and defending himself there against a criminal charge, according to the record in this case; but he can file a petition with the Tax Court, and he has that remedy.

So for all of those reasons, I think, as I said, with some reluctance, this doesn't come with the exception of the
34 Enoch case, and the Court lacks jurisdiction.

The test that is set forth in the Virginia Jobbers case has not been met; and the Court, accordingly, for all of the reasons given will deny the motion for preliminary injunction and grant the Government's motion to dismiss.

If the Government will present an appropriate order, the Court will entertain it.

Mr. MILLER. May I approach the bench, Your Honor?

The COURT. You surely may.

Mr. MILLER. The lecturn is what I mean.

If the Court please, in view of the time situation we find ourselves in—we are now late Friday afternoon; the client and his lawyer both are of the same faith and both are confined to

their homes from sundown to sundown; I understand that we are now entering the holiday period—I know we are—I would request that the Court . . .

The COURT. I can assure you, Mr. Miller, I have not. I have been very busy and I think you probably have, too.

Mr. MILLER. If the Court pleases, this is the holiday season, deliver me from it. It seems to save all up for December.

But if the Court please, I would like to move that the action of the United States in this case be stayed until noon . . .

The COURT. You mean the decision of the Court.

Mr. MILLER. Pardon?

35 The COURT. You are asking that the decision of the Court be stayed.

Mr. MILLER. Yes, I am asking that the stay against the Government be continued to enable us to file a notice of appeal and seek a stay from the Court of Appeals.

And, if the Court please, it would be impossible, obviously, to do it before Tuesday. We could get it in by Tuesday; but I know the Court of Appeals normally requests that they be given a couple of days leeway; and I don't see that any injury to the United States because they have the man and they have his money.

So if the Court would entertain this motion to stay the Government action in this case until noon a week from Friday—I don't know what the date is . . .

The COURT. That's the 28th.

Mr. MILLER. The 28th.

The COURT. Friday is the 28th, a week from today.

Mr. MILLER. And we will undertake—obviously, prior to that time—to file a notice of appeal and seek to obtain a stay in the Court of Appeals continuing beyond that date, Your Honor.

The COURT. Any objection, gentlemen?

Mr. RANKIN. Your Honor, the Government strongly opposes the motion for a stay. This Court has already found it lacks jurisdiction in the case, and we submit it lacks

36 jurisdiction to grant a stay here.

Plaintiffs' remedy is obviously in the Court of Appeals; and there is a procedure for getting there, and they can get there today. And there is no need for a stay from this Court.

The COURT. Let me ask you this, Mr. Rankin: In all candor, you are within your perfect right to say that. I agree with you—I don't think this Court has jurisdiction either.

But that doesn't necessarily mean that I don't have jurisdiction to stay the effect of my order so that the plaintiff can have the opportunity, at least, for appellate review.

How does that follow?

Mr. RANKIN. We submit that plaintiff has an opportunity to get appellate review without a stay order from this Court.

The COURT. It's even less than about 12 or 13 minutes to 4:00, and I doubt if there is an Appellate Judge in this building. I may be totally in error.

The Clerk's Office and our Court's office, everybody's gone.

I just don't want the Court or the Government to be heavy-handed about this or to do anything that would legitimatize the claim of being heavy-handed.

I feel confident that what I've done here is absolutely

37 right. But what harm is going to come except that maybe you will have to write a brief—but you've already got that done—in the Court of Appeals, depending on the decision of this Court, for one more week? And you can do it on an expedited basis.

Mr. RANKIN. Your Honor, . . .

The COURT. This isn't something that the Court of Appeals will drag out. I am sure they won't. They can be made to realize, because there is an element in this case that I didn't mention but I am sure you're aware of; There is a delicate element of international relations that's involved here; and it's a duty of this Government and an obligation of this Government to uphold the dignity of its treaty.

And unless you can show me that this is going to substantially and irreparably damage the relationship between the United States and Israel by virtue of that treaty, I think that the interest of justice requires the Court of Appeals to be given an opportunity to review this.

I don't think they'll take much time or need much time to do this, but . . .

Mr. RANKIN. Your Honor, if I may just address myself briefly to that.

The COURT. Surely.

Mr. RANKIN. As the Court knows; we are fully aware of the sensitive nature of this case. And we saw fit to ex-

38 pedite responding to the preliminary injunction motion, which was not even before the Court, on an expedited

basis of five days, including a weekend, and overnight responded the best we could to interrogatories.

And we submit, Your Honor, that a stay, when this Court has already found jurisdiction, to a week from . . .

The COURT. Lack. A lack of jurisdiction.

Mr. RANKIN. Found that it lacked jurisdiction.

. . . to a week from today, flies in the face of the fact that this Court has held that it lacks jurisdiction and the sensitive nature of the dealings that we are faced with here.

And we submit to Your Honor that the stay should not be granted, but certainly no stay for a week for this order.

The COURT. I will tell you what I am going to do, Mr. Rankin.

Mr. MINSKER. Your Honor, may I be heard?

The COURT. No, just be quiet and calm.

I'll tell you what I'm going to do: I am still trying to get out some other work.

I am going to let you go right upstairs to the Court of Appeals right now, and let Mr. Miller make application to them; and you can make application to them if you can find anybody there.

If nobody is there, I will stay my order until the
39 earliest possible moment, which will be no later than Wednesday of next week. I think then you can get a motions clerk or a motions panel on duty.

But I think in order to avoid being heavy-handed and in order to expedite it, I will stay my order until the day after Christmas, on the 26th, unless the Court of Appeals directs otherwise.

You can have the record. I don't know if everything is in the jacket or not. But you can go up there and let me know if they can entertain your motion between now and the 26th or not and what their feelings are about it. I doubt if you will find anybody there.

Mr. MINSKER. Your Honor, I know this is extraordinary and I hate to interrupt.

But there has been a representation that you lack jurisdiction . . .

The COURT. I have already ruled and we'll have no re-argument.

Mr. MINSKER. No, no, no. I mean on granting the stay, Your Honor. That's the only point.

I have a citation that states that when you deny a temporary restraining order, you still have jurisdiction to stay it . . .

The COURT. I understand that.

Mr. MINSKER. It's established in Moore's Federal
40 Practice in the case of *McBride* v. *Western Union*.

The COURT. I understand that.

Mr. MINSKER. Okay. Thank you.

The COURT. I realize you have worked so hard on this case and you're all wrought up in it.

Mr. MINSKER. Thank you.

The COURT. I've been in your shoes myself many times.

Mr. RANKIN. Your Honor, we did submit an appropriate order with our motions papers.

The COURT. Yes, you did.

Mr. RANKIN. And if the Court could examine that to see if it deems it appropriate.

[The Court examines the order.]

The COURT. I'll tell you what I'm going to do. I think the order that the Government submitted is proper.

Part of these papers are mine, and part of them belong to the clerk's file. I'm going to take them back and get my law clerk to straighten them out for me, what belongs to the Court and what belongs to the clerk. And you gentlemen in the meantime can run up to the Court of Appeals, and I'll sign the order.

I will be back in my chambers.

Mr. RANKIN. Your Honor, I would just like to request an expedited copy of the transcript, an immediate copy, if
41 possible.

Mr. MINSKER. We would want the whole opinion, not just the order.

Mr. ZIMMERMAN. If the Court please, just a note of inquiry: Is the Government stayed until the 26th, and we are not to go to the Court of Appeals?

The COURT. No, it's what I said to Mr. Miller, and perhaps it wasn't clear.

You asked for a stay until the 28th.

Mr. MILLER. Right.

The COURT. I said, "You go upstairs to the Court of Appeals in view of their vigorous objection."

I know I've got authority to stay my own order. They know that's elemental, even in the light of my finding of a lack of jurisdiction.

And I want you to find out if you can get a hearing by the 26th. I just don't know whether any Judge is going to be there next week. That's the problem.

If somebody is there now, so much the better. You can argue it today.

This hasn't been that long. They only need my opinion, and then you can find out. Go to the clerk's office and see who is up there; and let's get it expedited and get the review done.

In the meanwhile, I'll get the record together here.

42 Mr. ZIMMERMAN. We will return to your chambers very quickly, I am sure.

The COURT. All right.

[Thereupon, the above-entitled matter was concluded at 3:55 p.m.]

[Jurat omitted in printing]

[Filed January 3, 1974]

United States Tax Court

[Title omitted in printing]

PETITION

Samuel Shapiro hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue of his notice of deficiency dated December 21, 1973, and, as a basis of this proceeding, alleges as follows:

1. The petitioner is a citizen of Israel with legal residence in Monsey, New York 10952. His income-tax return for the calendar year 1971 was filed with the District Director of Internal Revenue for the District of New York, at New York, New York. No return was filed for the calendar year 1970.

2. The notice of deficiency, a copy of which is attached hereto and marked Exhibit "A", was served on counsel for the petitioner on December 21, 1973. It was received by petitioner on December 26, 1973.

3. The Commissioner determined a deficiency in income tax for the calendar years 1970 and 1971 in the total amount of $90,180.61, all of which is in controversy.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in determining that the petitioner realized unreported taxable income by an unexplained bank deposit at the First National City Bank in 1970 in the amount of $18,000.

(b) The Commissioner erred in determining that the petitioner realized unreported taxable income in the amount of $137,280 in 1971 "as a dealer in narcotics."

5. The facts upon which the petitioner relies as the basis of his case are as follows:

(a) The deposit in the amount of $18,000 was money that petitioner had brought with him to the United States from

Switzerland. It was deposited by him at the First National City Bank in order to enable him to issue a check on December 21, 1970, to Keren Eretz Israel Shel Hamizrachi in repayment of a loan in that amount made to him while he lived in Israel.

(b) Petitioner was not a dealer in narcotics in 1971 and did not realize the income stated in the notice of deficiency from any such activities.

(c) Petitioner lived in the United States between 1970 and 1973 on funds which he had earned prior to his arrival in the United States and which were kept for him in Switzerland and were brought to the United States for his use from time to time.

(d) The determination of the Commissioner set forth in Exhibit "A", attached hereto, is arbitrary and discriminatory, is not based on true facts and is erroneous.

Wherefore, petitioner prays that this Court hear this proceeding and:

1. Determine that the Commissioner erred as alleged in each assignment of error set forth in paragraph 4 above;

2. Find that there is no deficiency in income tax for the calendar years 1970 and 1971; and

3. Grant such other and further relief as may be proper in the premises.

RAYMOND G. LARROCA
MILLER, CASSIDY, LARROCA & LEWIN,
1320 19th Street NW., Suite 500,
Washington, D.C. 20036 (202) 293–6400.
Counsel for Petitioner.

[Jurat omitted in printing]

Supreme Court of the United States

No. 74–744

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SAMUEL SHAPIRO, ET AL

Order Allowing Certiorari. Filed February 18, 1975.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

○